No. 6871.

In The United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT.

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Appellant,

versus

NANNIE MAY WILLIAMS,
Appellee.

BRIEF FOR APPELLANT.

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versus

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Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This suit was brought by Nannie May Williams to recover from The Union Central Life Insurance Company on a lapsed insurance policy of $10,000.00 on the life of Peter Hardy Williams, her deceased husband. The policy was of the ordinary life type, issued July 26, 1927, but at an age rate as if issued June 10, 1927, and requiring payment of a premium of $449.10 annually. When the June 10, 1930, premium matured, the insured borrowed $848.00 from the company against the policy, and borrowed $1,643.63 additionally from Lee & Lee, agents of the company, with which to continue in force for another year this and other insurance. But when the premium of June 10, 1931, fell

due the policy lapsed. The indebtedness against the policy amounted, with interest, at that time, to $898.88, which lacked only $11.12 of absorbing the entire cash surrender value, $910.00, of the policy, and the $11.12—applied to the purchase of extended insurance—was insufficient even to cover the cost of the thirty-one days of grace granted for the payment of the premium. A cash dividend of $74.80 was, on the former policyholder's written order, executed September 18, 1931, paid by the company by check on September 28, 1931, to Lee & Lee who had accepted such order as payment pro tanto on the note in their favor for the personal loan of $1,643.63, and thereupon had taken the former policyholder's renewal note for the balance. Death of the former policyholder occurred on October 15, 1931.

This suit is brought upon the theory (1) that the former policyholder was non compos mentis when he executed the order of September 18, 1931, that, for such reason, the payment of such dividend by the company in accordance with such order was ineffectual to discharge the company's obligation to the former policyholder, and (2) that under a contended-for construction of one or another policy provision, molded to conform to a contended-for construction of a Texas statute, the allegedly undischarged liability to the former policyholder for the cash dividend should have been liquidated by the company by substituting therefor "term insurance" in favor of the former policyholder's beneficiary for a brief period, which, as it happened, would include the date of death of the former policyholder.

The Court, with misgivings, refused the defendant's request for a peremptory instruction, submitted the case to the jury; the jury returned a verdict in favor of the plaintiff; judgment was entered pursuant to the verdict; mo-

tion for new trial was overruled, and the defendant, having duly excepted to the charge of the Court, and to the Court's refusal of a request for peremptory instruction, has brought the case to this Court for review.

The presented questions of liability relate to the admissibility and asserted probative force of the pretended evidence of mental incompetency and to the propriety of the contended-for constructions of statute and policy provisions.

SPECIFICATIONS OF ERROR.

1. The Court erred in refusing to give to the jury the defendant's specially requested charge directing a verdict for the defendant, which charge reads as follows:

> "Under the competent and admissible evidence offered in this cause, the plaintiff is not entitled to recover on the policy in suit, in its original form or in any other form of insurance upon the life of Peter Hardy Williams, and you will now return a verdict for the defendant,"

for that the undisputed evidence showed that the policy sued on was not in force at the date of the death of the insured Peter Hardy Williams, either in its original form or in any other form of insurance on the life of the said Peter Hardy Williams. (First Assignment of Error, as amended, Tr., p. 212.)

2. The Court erred in admitting the evidence on behalf of the plaintiff as follows:

Question of the plaintiff's attorney propounded to the plaintiff's witness Dr. F. S. White:

> "Now, doctor, please answer the question that I am about to propound to you, basing your answer thereto upon the following assumed state of facts: For several years prior to the year 1931, P. H. Williams was engaged upon a large scale in the oil business, including the drilling of wells. He was active and energetic; he was, generally speaking, of a sociable disposition and even temperament. Prior to the year 1931 he suffered heavy financial losses, and became despondent, and on at least one occasion he became so morose as to talk of suicide. In the spring and early summer of 1931 there was noticeable to some of those coming in contact with him some lapse

or loss of memory, relating to recent events. During that portion of the year 1931, prior to August 16, 1931, which is the date of the accident that will be hereinafter mentioned, he managed his farm in Irion County, Texas. He at times did work as driving a tractor, handling cattle and general work about the farm. Prior to August 16, 1931, he gave some signs of occasional indisposition, apparent to his wife, but was able to and did work involving physical labor occasionally, as hereinabove indicated. On or about August 16, 1931, while branding a bull yearling, he was kicked in the abdomen by that yearling with such force as to knock him down. Thereafter he did not do any work on the farm involving any material or appreciable physical exertion. He did give directions to the farm hands as to the work, but he was not able to bear in his memory from one day to another the directions so given, this being noticeable on a number of occasions; after the said accident he complained of discomfort, and at times pain in the abdomen. When walking he stooped, and at times was observed holding his hands to his abdomen and side. He became short of breath; at any appreciable exertion he would gasp for breath. Hiccups and headaches developed shortly after the accident and continued intermittently until the time of his death. The hiccups continued to a few days before his death, when he suffered a hemorrhage, after which hemorrhage he did not have hiccups. Both shortly prior to the accident and after the accident he was observed on several occasions sitting in his car, stooped and bowed over the steering wheel, with his head downcast, being and remaining in such position for periods of from thirty to forty-five minutes, manifesting on said occasions no interest whatsoever in his surroundings. In the latter part of August and early part of September, 1931, he went through clinical examinations, including laboratory urinalysis and X-rays, at the San Angelo medical and surgical clinics. Abnormali-

ties were evidenced, by casts, and some sugar was observed in the urinalysis, but not so as to definitely indicate the cause of his trouble. No positive or definite diagnosis was made by the physicians at the clinic, but the X-rays and other findings suggested to the examining physicians and indicated to them that he had a serious disorder, involving the liver and perhaps the gall bladder—in their opinion either a condition of malignancy or cirrhosis. No condition of ascites or dropsy was noted during the period of said examinations, which extended until about the middle of September, 1931. X-rays made of the teeth during said examination disclosed pus pockets in several teeth, and on September 17, 1931, in the morning of said day all of his teeth, some fourteen in number, were extracted. A local anesthetic, with the dental blocking technique, was used. The operating dentist noticed that several teeth had pus pockets at the roots, and further noted a condition of ankylosis in bone tissue, and a deterioration of bone tissue. In the afternoon of said day of September 17, 1931, the said P. H. Williams went from San Angelo, where the dental operation had been performed, to his ranch or farm in Irion County, Texas, a distance of some twenty miles, being taken there in a car. Upon his arrival there he went to bed and spent a restless and practically sleepless night, his gums bleeding all during the night, and practically throughout the night, his condition of restlessness being such that his groaning was noticeable to a farm hand sleeping in the next room to the room adjoining the one in which Mr. Williams was sleeping—noticeable at times during the night. On the morning of September 18, 1931, the said P. H. Williams did not eat any breakfast. He appeared to be to those at the place, and so stated to them, weak and sick. His gums continued to bleed intermittently during the early morning of said date of September 18th. During the preceding night he had had fever. He had some fever during the early

morning of September 18th. He had fever in the afternoon of September 18th a little higher than it had been early in the morning, the fever in the morning being two degrees, or thereabouts, above normal, and in the afternoon being something like two degrees above that in the morning. He did not eat any dinner. He was in bed most of the early part of the morning of September 18th, and sat up during part of the morning of September 18th in a chair in the room joining the bedroom. In the afternoon of September 18th he grew weaker. He had been given aspirin while at his house to relieve his suffering and discomfort. In the afternoon or early in the evening or night of September 18th he became—to those surrounding him, to his wife—so weak and his gums bleeding so much that she returned with him to San Angelo, to the Central Hotel, arriving there in the night of September 18th. He remained in the Central Hotel from September 18th to the date of his death. From the night of September 18th until the date of his death—his death occurring on October 15, 1931—he was not, during all of that period, in bed; part of the time he was in bed and part of the time he would sit upon the bed. At times between September 18th and the date of his death—for a few days after September 18th—his gums bled so much he had hemorrhage, and physicians had to be called and morphine administered. On the night of September 18th he was again restless and sleepless. These hiccups were almost constant, with few intermittent periods between September 18, 1931, and the date of the hemorrhage, which preceded his death by only a few days. He complained during this period, between September 18th and the date of his death, of discomfort and pain in his abdomen, shortness of breath, being troubled so much that he had to be propped up and had to sit up in bed with a pillow behind him instead of lying down. Now, he was able to go to see a doctor on or about September 30, 1931, able to walk

to his office, to the doctor's office, that doctor being Dr. Marberry. Dr. Marberry found, upon examination, when P. H. Williams first came to him in the latter part of September or at the last of September, a marked condition of ascites or dropsy, and found by manipulation and examination that the liver was abnormally small. His diagnosis was cirrhosis of the liver. The prognosis was very unfavorable, he stating that he saw nothing could be done to save him. The only thing that he undertook to do was to try to alleviate, to some extent, the discomfort produced by this dropsy—alleviating that by injecting a needle in the abdomen and drawing off the fluid on several occasions, the amount of fluid running as high as two gallons. Dr. Marberry treated him once, perhaps twice, at the office. He went to see Mr. Williams at the hotel also, and performed this operation to alleviate his discomfort from the ascites. He said that no appreciable relief was obtained. Those who observed P. H. Williams noticed changes in him, physically and otherwise, and some noticed them at one time and some at another time, some placing the date early in the year 1931, some in the summer of 1931, some before, and some after the date of the accident in August, 1931. Dr. Nibling, one of the physicians in the clinic, noted that Williams was suffering from a serious disorder—such a disorder as to result in a toxic condition calculated and likely to influence or affect his nervous system and his mental powers; but Dr. Nibling stated that he did not observe unsoundness of mind. Those who were in contact with P. H. Williams and closely associated with him observed marked change, both as to his physical condition and as to his mental condition, as hereinabove outlined, and as to his personality, and as to his characteristics; and these changes had been observed and noted prior to September 18, 1931.

Now, doctor, basing your answer upon said assumed state of facts, please state whether or not, in

your opinion, P. H. Williams, on September 18, 1931, had the mental power and capacity to weigh and understand and consider the nature and effect of a business transaction, assuming that all of those facts are true.

Answer: I will answer that question assuming all of these statements are true, and assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper,"

for that the sum total of the evidence introduced on the basis of which the hypothesis was stated was insufficient to form any basis for the framing of a hypothetical question to an alienist as to the mental capacity of P. H. Williams; for that the question, taken as a whole, was too vague and indefinite in detail to form any basis for the rendering of an opinion by an alienist; for that, taken as a whole, there was no basis in the testimony for the assumption of facts stated to the witness; for that the assumption in such question that Williams had suffered a loss or lapse of memory as to recent events was objectionable on the ground that there was no specification of the things not remembered or of the surrounding circumstances or of the dates of such matters; for that the assumptions in such question, as to some signs of occasional indisposition apparent to the wife as to material or appreciable physical exertion, followed at some vague and indefinite time by a lack of material or appreciable physical exertion on the part of said Williams, as to Williams not being able to bear in his memory from one day to another directions given by him to people on his farm, as to Williams at times holding his hands to his side, as to Williams on several occasions being observed sitting in his car, drooped and downcast, as to Williams, after going to San Angelo to consult doctors, being part of the time

in bed and part of the time not, as to Williams suffering a shortening of breath so much that at times he had to sit up and be propped up, were too vague and indefinite to form any basis for the expression of opinion by an alienist as to Williams' mental capacity; for that there was no basis in the testimony for the assumption of facts stated in the question with reference to Williams not being able to bear in his memory from one day to another directions that he had given; for that the assumption in such question with reference to certain witnesses having noticed a change in Williams' condition or a marked change in condition, mentally and physically, did not inform the alienist as to what the changes were; and for that in other respects, too numerous to mention, the question was too vague and indefinite, and for that in other respects too numerous to mention there was no basis in the testimony for the facts assumed. (Twelfth Assignment of Error, Tr., p. 204.)

3. The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation quoted totidem verbis from his charge to the jury:

> "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony.. * * * *If she has done that then she is entitled to a verdict.*
>
> * * * * * * *
>
> *"There is also an option one and an option two. Option one reading, in part, as follows: 'Accumulations of dividends at interest may be applied to in-*

crease the term of extension of insurance'; option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'

* * * * * * *

"The Court holds that under those two options that I have read, that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now, think with me carefully—was that done in this case? *Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff.* If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee and Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them on the year before. But, no one may make such a contract as that, or any contract for that matter, unless he is in his right mind. If he was not in his right mind at that time, or, if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee, and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case he ordered, and was entitled to have that dividend purchase extended insurance.

* * * * * * *

"If you find that Mr. Williams, at the date of executing this order to Lee and Lee to collect these dividends which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee

and Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff."

for that such charge expressly or impliedly indicates, but erroneously indicates, that the insured had the right, under the policy, to the use of the 1931 dividend for the purchase of extended insurance, and for that the same is contrary to the evidence and to the valid provisions of the policy which established that if the policy should lapse for the nonpayment of the premium, as it did lapse for the nonpayment of the January 10, 1931, premium, that the dividend then due should be paid in cash. (Fourth Assignment of Error, Tr., p. 196.)

4. The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation, quoted totidem verbis from his charge to the jury:

"The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * If she has done that, then she is entitled to a verdict.

"There is also an option one, and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'

"The Court holds that under those two options that I have read, that the earned and unused dividend at

that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now, think with me carefully—was that done in this case? *Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff.* If your find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee and Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them on the year before. But no one may make such a contract as that, or any contract for that matter, unless he is in his right mind. *If he was not in his right mind at that time, or if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee, and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case, he ordered and was entitled to have that dividend purchase extended insurance* • • •

"If you find that Mr. Williams, at the date of executing this order to Lee and Lee to collect these dividends which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee and Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff."

for that such portion of the charge expressly or impliedly indicates, but erroneously indicates, that the insured did exercise any right in any way to use dividends for the pur-

chase of extended insurance, and for that there was no evidence of any such exercise or application within the time specified in the policy therefor, or in fact at all. (Fifth Assignment of Error, Tr., p. 198.)

5. The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation, quoted totidem verbis from his charge to the jury:

> "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * *If she has done that, then she is entitled to a verdict.* * * *
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> "There is also an option one, and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.' * * *
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> "Now, think with me carefully—was that done in this case? Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff. If you find that he did not, then you will find for the defendant.
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> "You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee and Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them

on the year before. But no one may make such a contract as that, or any contract, for that matter, unless he is in his right mind. *If he was not in his right mind at that time, or if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee*, and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case, he ordered and was entitled to have that dividend purchase extended insurance. * * *

"If you find that Mr. Williams, at the date of executing this order to Lee and Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee and Lee, and that he knew what he was doing, then you should find for the defendant. *If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff,*"

for that the portion of the charge quoted submits to the jury an issue of the insured's mental incompetency and to find for the plaintiff if it found the insured mentally incompetent, and for that the evidence was insufficient to justify the submission of such issue to the jury. (Sixth Assignment of Error, Tr., p. 200.)

6. The Court erred in giving to the jury the instruction indicated by the underscoring (here shown in italics) in the following quotation totidem verbis from his charge:

"Write your verdict, please, upon the form which the clerk will give you, saying: 'We, the jury find for the plaintiff in the sum of $9,101.12 *plus* $910 *attorneys' fees, plus 12 per cent. penalty*, plus 6 per cent. interest from January 1, 1932,' "

for that the state statute with reference to attorneys' fees and penalties is unconstitutional, and for that the provision of such statute with reference to the recovery of attorneys' fees or penalties were not complied with in this case. (Thirteenth Assignment of Error, Tr., p. 210.)

7. The Court erred in overruling the special exception filed by the defendant in his answer to the petition filed in this case with reference to the recovery of attorneys' fees and penalties. (Fourteenth Assignment of Error, Tr., p. 211.)

BRIEF OF THE ARGUMENT.

FIRST SPECIFICATION OF ERROR.

"The Court erred in refusing to give to the jury the defendant's specially requested charge directing a verdict for the defendant, which charge reads as follows:

> " 'Under the competent and admissible evidence offered in this cause, the plaintiff is not entitled to recover on the policy in suit, in its original form or in any other form of insurance upon the life of Peter Hardy Williams, and you will now return a verdict for the defendant,'

for that the undisputed evidence showed that the policy sued on was not in force at the date of the death of the insured, Peter Hardy Williams, either in its original form, or in any other form of insurance on the life of the said Peter Hardy Williams" (Tr., p. 212, being section 1, as amended, of the assignments of error.)

The defendant requested, and the Court refused, the charge as above set forth in the specification of error. The defendant took due exception to the refusal of the Court to give such charge (Tr., p. 180).

FIRST PROPOSITION.

The company's contractual obligation with reference to the dividend of $74.80 of June 10, 1931, was to pay the same in cash to the policyholder. The company owed no duty, and possessed no right, even if it so desired, to substitute for a cash payment a short-term insurance in favor of the former policyholder's beneficiary. This is especially true, when the policyholder requested, and the company assented, that such dividend should be paid in cash to third persons on a valid debt of the policyholder to such

third persons and when the dividend was paid by the company in entire good faith to such third persons immediately and prior to the policyholder's death.

STATEMENT AND ARGUMENT.

The contractual obligation with reference to the dividend of $74.80 of June 10, 1931, is expressed in the policy as follows:

> "In the event * * * the policy shall lapse, the dividend then due shall be paid in cash" (Tr., p. 85, Art. 12).

The stipulation is contained in an article devoted to provisions for the automatic disposition of dividends. Such article follows another devoted to options open to the policyholder, for his choice, regarding the disposition of dividends.

Such "Dividend Options" article (so headed in the policy itself) follows with such explanatory matter as is deemed proper (Tr., p. 85):

"11. Dividend Options.	**Explanatory Matter.**
[1] Dividends may be withdrawn in cash;	
[2] or applied to the payment of premiums;	Each previous dividend had been so applied, in connection with cash payment to the company of the balance of the premium. The dividend of $74.80 was insufficient to pay the annual premium of $449.10. The policy provided for acceptance of nothing less than an annual premium; but the

11. Dividend Options.	Explanatory Matter.
	company would have accepted as little as a quarterly premium, had request for change of policy in this respect been made. But the dividend was insufficient for payment even of a quarterly premium. Hence, such method was unavailable.
[3] or left to accumulate with interest at three per cent, increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy, subject to withdrawal at any time;	No such request ever had been made. No dividends had ever been left with company.
[4] or applied to the purchase of paid-up participating additions to the policy,	No such request ever had been made. No dividend had ever been so applied. The "paid-up participating additions to the policy" thus purchased with dividends are, and always have been, known in the business as "dividend additions," or "paid-up additions."
[5] convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger,	The company, of course, carries a reserve against such dividend additions, as well as against the policy proper, and such "dividend additions" may be surrendered for, or converted at any time into, cash for the amount of the dividend, or

11. Dividend Options.	Explanatory Matter.
	of the reserve, if larger than the dividend (the reserve being equal to the amount of the dividend plus interest but less mortality cost).
[6] but payment may be deferred by the company ninety days from the date of application therefor."	

It will be observed that there is here no option in the policyholder to request, and no promise by the company to grant, as a substitute for the dividend, any term insurance in favor of the policyholder's estate, or of the policyholder's beneficiary, or, indeed, of anyone.

Further, it will be observed that any option must be exercised before any provision for automatic disposition becomes applicable under the next succeeding article. In other words, such option must be exercised at least within the thirty-one days of grace after premium maturity. The dividend becomes available at premium maturity, and either the policyholder's selected option of disposition or the automatic disposition is put into effect by the end of the grace period.

The "Automatic Disposition" article (also thus termed in the policy) follows, with similar explanatory matter (Tr., p. 85):

"12. Automatic Disposition.	Explanatory Matter.
[1] On payment of the premium	But the premium was not paid. Hence this was inapplicable.
[2] or on the policy anni-	But further premiums

12. Automatic Disposition.	Explanatory Matter.
versary if no further premium is payable, if no other option has been elected,	were payable under the policy, that is, it had not become paid up, as, for instance, a 20-payment life policy is paid up at the end of 20 years. Hence this was inapplicable.
[3] the dividend then due shall be applied to the purchase of paid-up additions.	
[4] In the event	
[5] of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected,	But the insured did not die during the days of grace. Hence this was inapplicable.
[6] or if the policy shall lapse,	**The policy did lapse and this automatic provision became applicable.**
[7] the dividend then due shall be paid in cash.	**The dividends became payable in cash.**
[8] At the death of the insured during the continuance of the policy, the pro rata part of the dividend for the current policy year shall be paid in cash."	But death did not occur during the continuance of the policy. Hence this provision was inapplicable.

In support of her claim that (disregarding the order of the company to pay the dividend in cash to Lee & Lee and the company's actual payment of the same to Lee & Lee) the company should have liquidated the dividend of $74.80 by substituting therefor term-insurance in favor of the policyholder's beneficiary, the plaintiff, as we un-

derstand, advances three alternative contentions, urging that some one of them is proper for adoption. These are that:

Either, first,

the company should have applied the dividend of $74.80 of June 10, 1931, to the reduction of the lien indebtedness against the policy;

or, second,

the dividend, though not available until June 10, 1931, and necessary, by exercise of option, or by automatic provision, to become fixed in disposition or application within the thirty-one days of grace thereafter, should be treated as if the policyholder had previously made a request to the company to allow such dividend "to accumulate with interest at 3 per cent, increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy" within the meaning of the third dividend option in article 11, hereinbefore copied;

or, third,

the dividend of June 10, 1931, should be treated as if constituting a "paid-up addition" within the meaning of a provision of the policy and a "dividend addition" within the meaning of a statute of Texas.

The policy, as usual, contains provisions for loans and cash surrender values (Tr., p. 87, Arts. 15, 19, 23).

Also, as usual, the policy provides that in the event of nonpayment of a premium, the surrender value of the policy may be applied in any one of various ways, at the option of the policyholder, and that if no option be exercised by the policyholder the surrender value shall be automatically applied by the company in a particular manner.

The policy specifies the exact amount in figures of the cash surrender value at the end of each of various years. The amount so specified for June 10, 1931, is $910.00 (Tr., p. 88). This cash surrender value constituted the full reserve under the policy, computed, as specified therein, on the American Experience Table of Mortality, with interest at the rate of 3½ per cent, less a surrender charge of $60.00 (Tr., pp. 174, 86; Arts. 14, 15).

A statute of Texas (R. S., Art. 4732), similar in terms to statutes of numerous other states, requires that policies of life insurance issued in Texas shall contain a provision whereby the insurer shall stipulate for the payment to the insured, or for the application to the purchase of some form of insurance, upon the occasion of a premium default, of the reserve on the policy, less a certain surrender charge; but the permitted surrender charge is 2½ per cent of the face amount of the insurance, or, in this case, 2½ per cent of $10,000.00, or $250.00. Hence, the provisions of the policy in question are more favorable to the policyholder than the statute of Texas requires, in that the cash surrender value promised by the company is $910.00, whereas a figure of $720.00 ($970.00 less $250.00) would have satisfied the Texas statute.

Some further explanation of the plaintiff's three contentions will be made separately.

First Contention of Plaintiff.

The claim that the company should have applied the dividend of $74.80 of June 10, 1931, to the reduction of the lien indebtedness against the policy is not based upon any provision of contract or statute. The company's contractual obligation was to pay the dividend in cash. The company had made no reservation in policy or in loan agree-

ment of any right on its part to apply the dividend to the reduction of the lien indebtedness. On the contrary, promises by the company of loans were limited to amounts within the cash surrender value of the policy, and were entirely secured thereby. The company having promised, without reservation, to pay the dividend in cash, the policyholder could enforce such payment. Any attempt by the company at application of the dividend to reduction of the lien indebtedness would have been futile. The lien indebtedness was not even an obligation of the policyholder against which the right of set-off would exist. The loan agreement was not a note or an obligation of the policyholder to repay the sum received from the company. It was a mere assignment to, and deposit with, the company of the policy, as sole security for a certain sum received from the company (Tr., p. 91). The company's right thereunder is specified in the instrument and in the policy, and is limited to such specification. Such right, in effect, is but the single right that the insurance shall cease when, and only when, the amount of the lien and interest shall equal the cash surrender value of the policy (Tr., p. 91).

Second and Third Contentions of Plaintiff.

The second and third contentions of the plaintiff refer to the provisions of the policy applicable to the use of the surrender value upon default in premium payment.

The policy extends to the policyholder three options, labeled Options 1, 2 and 3, for the use of the surrender value. They are declared to be all of equal value. It is specified that: "If, on failure to pay a premium, no option is exercised, such value shall be applied as provided in Option 1" (Tr., p. 86, Art. 16).

It is stated that such options are granted "provided

there be no indebtedness or advances on the policy" (Tr., p. 86, Art. 16).

But, further, it is stipulated that "if there be any indebtedness or advances on this policy, the cash value shall be reduced thereby; the paid-up value shall be reduced proportionately, and the extended insurance shall be for the face value of the policy, less the indebtedness and advances and for such term as said reduced cash value will provide" (Tr., p. 88, Art. 22).

The options, together with such explanatory matter as is deemed proper, follow (Tr., pp. 87-88):

"17. Option 1—Extended Insurance.	Explanatory Matter.
[1] Applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1).	The cash surrender value specified for June 10, 1931, was $910. Had there been no indebtedness against the policy, this $910, if this option had been exercised, or, indeed, if no option had been exercised, because Option 1, in that event, was automatic, would have been used to purchase Participating Term Insurance from the company. This is a form of insurance different from and cheaper than Ordinary Life Insurance, which was the type covered by the policy. The $910 cash surrender value would have been sufficient to provide $10,000 of "Participating Term Insurance," according to the table

17. Option 1—Extended Insurance.

Explanatory Matter.

in the policy, for 4 years 330 days, or 1,790 days, and at that rate each day's insurance would have cost $910 divided by 1,790, or between 50 and 51 cents, whereas the type of insurance granted by the policy at $449.10 per year of 365 days, cost $469.10 divided by 365, or $1.29 per day. By the terms of the above quoted provision, applicable in case of indebtedness, the indebtedness then amounting to $898.88 was deductible from the cash surrender value of $910, leaving $11.12, and such $11.12 was applicable to the purchase of extended insurance for $10,000 (less $898.88) at the rate of between 50 and 51 cents per day for $10,000 of insurance. Such sum would have purchased only 22 days' insurance, and the extension would date from June 10, 1931, and hence the sum available would not even cover the cost of the 31 days of grace after the premium maturity.

[2] The value of any paid-up additions will be

Had there been any "paid-up additions" to the

17. Option 1—Extended Insurance.

Explanatory Matter.

used to increase the term of extension.

policy purchased with dividends under the terms of the 4th dividend option under Article 11, hereinbefore copied, the value of such additions, or—which is the same thing—the reserve held by the company against such "paid-up additions," would be likewise applied to the purchase of "Participating Term Insurance," increasing or lengthening the term of such insurance. Here there were no paid-up additions. However, the contention of the plaintiff is that the dividend of June 10, 1931, should be treated as if it were a paid-up addition.

[3] Accumulations of dividends at interest may be applied to increase the term of extension.

This provision is applicable to the third dividend option under Article 11, hereinbefore copied. If the policyholder had selected this third dividend option and had left a prior dividend "to accumulate with interest at three per cent increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy subject to withdrawal at any

17. Option 1—Extended Insurance.

[4] Dividends on extended insurance shall be paid in cash and only for completed policy years."

Explanatory Matter.

time," as specified in such option, then such "accumulations of dividends at interest" would also be applied to the purchase of "Participating Term Insurance" and would lengthen the term of such insurance. Here the policyholder had made no selection of the third dividend option, and had left no dividend with the company to accumulate with interest under the terms of the option. However, the plaintiff contends that the dividend of June 10, 1931, should be treated as if it had been left with the company to accumulate under the terms of such option, even though in the same breath the plaintiff claims that instead of being left with the company to accumulate at interest, it should be immediately used by the company in the purchase of participating term insurance.

The insurance purchasable under Option 1, it will be observed, is designated as "Participating Term Insurance." The appellation

17. Option 1—Extended Insurance.

Explanatory Matter.

"Participating" indicates that such insurance will share in dividends. Hence, some dividends will be payable on such participating term insurance. This provision is a stipulation that such dividends shall be paid in cash. They shall not be used in the purchase of further participating term insurance, which would increase or lengthen the term of such insurance. In other words, they are payable in cash, just as is the dividend of June 10, 1931, under the terms of the provision applicable thereto, hereinbefore copied.

The foregoing article contains the only expressions upon which the plaintiff bases his contentions, these expressions being contained in subdivisions [2] and [3] of the article, as above copied.

However, for the information of the Court, it may be desirable to set forth, in the same manner as above, the provisions of articles 18, 19 and 20 constituting other options open to the policyholder for the use of the cash surrender value. Such provisions will indicate the choices that were open to the policyholder, and the recurrence therein of the expressions "Paid-up additions," "Accumulations of dividends at interest," and of "Dividends * * * shall be paid in cash," will illustrate the identity of the meaning of these expressions in all instances and will

throw light upon the commonness of their use and of the understanding of their significance in insurance contracts.

"18. Option 2—Paid-up Insurance.

[1] Applied to the purchase of paid-up participating insurance, on written request and the surrender of the policy before the expiration of the days of grace (Table 2).

Explanatory Matter.

If the policyholder had selected this option and there were no indebtedness against the policy, the $910, according to the policy, would purchase paid-up participating insurance of $1,600. This means that the policy would have been paid up for life for $1,600. In other words, each dollar would purchase paid-up insurance for $1,600 divided by $910, or $1.58. The effect of the provision with reference to indebtedness against the policy would have been, had this option been selected by the policyholder, that the indebtedness, $898.88, would have been deductible from the cash surrender value of $910, and the difference of $11.12 would be applied to the purchase of paid-up insurance, and the same would have purchased $17.57 of paid-up insurance.

[2] Any paid-up additions will be added to the amount of the paid-up insurance.

Paid-up additions to the policy, had any been purchased with dividends in

18. Option 2—Paid-up Insurance.

[3] Accumulations of dividends at interest may be applied to purchase additional paid-up insurance provided the total amount of paid-up insurance shall not exceed the face amount of the policy.

Explanatory Matter.

pursuance of the fourth option under Article 11, hereinbefore copied, would have been of precisely the same character as the paid-up participating insurance purchasable with the cash surrender value under this option, and the face amount of such paid-up additions would have been added to the face amount of the paid-up participating insurance purchased with the cash surrender value. But here, of course, there were no paid-up additions, and no paid-up participating insurance, and no option exercised to apply the $11.12 of remaining cash surrender value to the purchase of paid-up insurance.

Had the policyholder selected the third option under Article 11, hereinbefore copied, and left some former dividend with the company "to accumulate with interest at three per cent increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy subject to withdrawal at any time," then under this pro-

18. Option 2—Paid-up Insurance.

Explanatory Matter.

vision such accumulation of dividends at interest would be applied to purchase additional paid-up insurance, provided, however, that the total amount of paid-up insurance should not exceed the face amount of the policy.

[4] Dividends on paid-up insurance shall be paid in cash."

This provision is similar to the provision last appearing in Article 17, above quoted. The "paid-up participating insurance," it will be observed, is "participating"—that is to say, it shares in the dividends—hence dividends will be payable thereon. Such dividends under this provision are to be paid in cash and are not to be applied to the further purchase of paid-up participating insurance.

"19. Option 3—Loan.

[1] Borrowed or taken in advance in whole or in part on the sole security of the policy, on assignment thereof, less the unpaid balance of the current year's premium and any indebtedness and previous advance on this policy, at six per

19. Option 3—Loan.

cent interest, payable annually on the anniversary of the policy, interest to be discounted and paid in advance (Table 3).

Failure to repay any such advance or to pay interest shall avoid this policy whenever but not until the total indebtedness and advances hereon, with interest, shall equal or exceed the then loan value and not until one month after notice shall have been mailed by the Company to the last known address of the insured, and of the assignee, if any.

[2] The loan value will be increased by the value of any paid-up additions.

[3] The loan value, less interest to next anniversary, is available at any time during the policy year if pre-

Explanatory Matter.

Here, again, if the policyholder had selected the fourth option under Article 11 and caused some former dividend to be applied to the purchase of paid-up additions to the insurance, then the loan value would be increased by the value of the paid-up additions, or, which is the same thing, the reserve carried by the company against these paid-up additions.

19. Option 3—Loan.

miums have been paid to the end of the year. Consummation of loans other than paid-up premiums on loans in this Company may be deferred by the Company ninety days from the date of the application therefor."

Explanatory Matter.

"**20. Option 4—Cash.**

[1] Collected in cash on written surrender of the policy before the expiration of the days of grace (Table 4).

[2] The cash value will be increased by the value of any paid-up additions.

Here, again, if the policyholder had selected the fourth option under Article 11, hereinabove quoted, and had caused some prior dividend to be applied to the purchase of paid-up additions to the policy, the cash value available on surrender of the policy would be increased by the value of the paid-up additions, or, which is the same thing, the reserve carried by the company against such paid-up additions.

[3] Payment may be deferred by the Company ninety days from the date of application therefor."

The Court will have observed the repetition of the expressions "Paid-up additions," "Accumulations of dividends at interest" and "Dividends * * * shall be paid in cash" in the quoted articles. These expressions are repeated in subdivisions of the articles as follows:

"Paid-up additions."

Art. 11, sub. 4
Art. 12, sub. 3
Art. 17, sub. 2
Art. 18, sub. 1, 2
Art. 19, sub. 2
Art. 20, sub. 2

"Accumulations of dividends at interest."

Art. 11, sub. 3
Art. 17, sub. 3
Art. 18, sub. 3

"Dividends * * * shall be paid in cash."

Art. 11, sub. 1
Art. 12, sub. 7
Art. 17, sub. 4
Art. 18, sub. 4
Art. 20, sub. 1

The expressions "Dividends * * * shall be paid in cash" and "Accumulations of dividends at interest" seem to us nontechnical and involving no possibility of doubt concerning their proper interpretation.

The terms "Paid-up additions" and "Dividend additions" are technical terms. They have a perfectly definite and well-understood meaning in the insurance business, and because the plaintiff, by her pleadings, contended that the dividend of June 10, 1931, was, or should be treated

as, a "Paid-up addition" or "Dividend addition" the defendant deemed it proper to introduce evidence concerning the meaning of these terms in the insurance business. One of the witnesses was an actuary for the defendant company; the other was the actuary for the Southwestern Life Insurance Company, a Dallas, Texas, institution. Both testified that the terms had only one meaning, namely, the small paid-up insurance additions to the policy purchased by dividends; that the terms were commonly employed in the business; that they had never had any other than this meaning (Tr., pp. 143-145, 169). This evidence was uncontradicted.

Facts With Reference to Lapse of Policy and Actual Payment of Dividend.

The policyholder had paid each premium prior to that of June 10, 1931, and in so doing had applied the annual dividend as part payment (Tr., p. 159); but the policyholder had exhausted his borrowing power under his insurance in June, 1930, and, in addition, indulging the hope of improved financial condition within the ensuing twelve months, had borrowed from Lee & Lee $1,643.63 with which to maintain his insurance. But he had been unable to repay this sum even in part, and was wholly unable to settle in any way the premium of June 10, 1931. The thirty-one days of grace expired without any payment, in whole or in part, and without the specification of any option of disposition of dividend or of cash surrender value (Tr., p. 160). The evidence is undisputed that the company received no such specification (Tr., p. 160).

The company, in due course, prepared its check for the dividend of $74.80, and for dividends on other policies, as well, in favor of the policyholder, and transmitted the same to its agents, Lee & Lee. Lee & Lee, however, re-

turned the check, and, having sent their attorney to interview the policyholder with reference to the payment of the policyholder's note to them of $1,643.63, and having obtained from the policyholder an order upon the company for the payment of the dividend to them, and having, upon receipt of such order, canceled and surrendered to the policyholder the note of $1,643.63, and accepted a renewal note for the difference, transmitted the written order to the company. The order was executed by the policyholder at his own home on September 18, 1931; and the company, on September 28, 1931, transmitted its check for the dividend to Lee & Lee, which check was promptly paid.

The policyholder knew and was informed that the policy had lapsed when he executed the order of September 18, 1931; but the company, also in due course, by letter dated October 7, 1931, advised the policyholder of the fact that the policy had become null and void, and had been canceled (Tr., pp. 165-166). This notice was duly received by the policyholder prior to his death, but, according to the testimony of his son, remained at the house unopened until after the death.

No claim of mental incompetency was asserted by the plaintiff at the time of the transaction between Lee & Lee's attorney and the policyholder on September 18, 1931, though the plaintiff was in an adjoining room. No claim of such mental incompetency was asserted by anyone until after the death of the policyholder. The company had no information of any such claim until long after this suit was brought, and then only in the form of a letter received from its counsel in charge of the suit, indicating that the plaintiff was making or intended to make such claim (Tr., p. 160).

The plaintiff does not claim that the policyholder, at

any time prior to the expiration of the thirty-one days of grace, June 10, 1931, communicated to the company, or any agent of the company, any selection of option with reference to the disposition of the dividend of June 10, 1931, or of the small remaining balance of the cash surrender value, $11.12. The undisputed evidence is that the company received no information whatever concerning the policyholder's wishes on this subject, and the automatic provisions of the policy took effect.

The plaintiff's entire claim of any expression of intention or desire on the part of the policyholder with respect to the dividend disposition, at variance with the payment of the dividend in cash to Lee & Lee, is based upon a passage in a letter from Lee & Lee to the company, dated September 14, 1931. In this letter Lee & Lee returned the first dividend check to the company and advised the company of the personal loan that they had made to the policyholder the year previous for the purpose of enabling him to maintain his policy in force, and of their efforts since to collect this advance, and of their intention to bring suit against the policyholder and to garnish the dividends in the possession of the company if the policyholder declined to pay. The letter was written before they obtained the written order from the policyholder dated September 18, 1931. The passage which the plaintiff contends constitutes some expression of the policyholder on or about the 1st of September, 1931, is as follows:

> "Our agent at San Angelo did not seem to press this matter with the proper amount of energy in seeing Mr. Williams personally until finally about the 1st of September he did see Mr. Williams and Mr. Williams told him he was not going to sign the surrender voucher with any part of it made payable to Lee & Lee; that it was a crooked deal and that he was

going to have every nickel applied towards paying these policies as far as it would carry them. In the face of this cold-blooded refusal of Mr. Williams we have had our attorney prepare papers suing Mr. Williams for the note and garnishing the company for all of these dividends" (Tr., p. 97).

But it will be noted that this recites some conversation about the 1st of September, 1931, long after the policy had lapsed, the days of grace had expired, the disposition of the dividend had become automatically fixed as payable in cash, and all time for the selection of any option had expired. Also, that it was not in terms applicable to any option granted by the contract, even had the option been properly exercised within the thirty-one days of grace, and that if application to some option be forced, the expression in the letter would most nearly fit the option for the purchase of a paid-up participating addition to the policy, specified in subdivision 4 of article 11 hereinbefore copied. This option would have entitled the policyholder to a paid-up addition of $17.57, or $1.58 of paid-up insurance for each dollar of dividend applied to the purchase. But in reality the recital evinces an intention of the policyholder to permit to remain lapsed all but a small part of his insurance, obtain in cash all moneys available under such policies and use the same in reinstating and continuing in force some small portion of his insurance, and not using any of the cash to make good his personal promise and obligation to Lee & Lee for the $1,643.63 they had advanced for him the preceding year.

Little argument seems necessary or appropriate in the facts of this case.

The relationship between the plaintiff and the defendant

is purely one of contract. The defendant is not liable to the plaintiff unless it has stipulated such liability.

The contract between the parties is to be fairly interpreted. It is not to be twisted or distorted, or its plain terms altered by any process of metaphysics or dialectics in order to award the plaintiff a judgment.

It is to be interpreted in accordance with the reasonable intent of the parties gained from the language of the contract.

Obviously, when the company promised to distribute dividends, it was necessary that the contract provide when and how the company would distribute the same.

The business of insurance is concerned with the risk of death. That risk in an individual case may change greatly in a single day—even in a single minute. Any choice of alternatives, involving either an increase or a termination of the risk, should be promptly made. An insurance company must be able to know the risks for which it is liable. It cannot carry transactions along in suspense, in such wise that it will be held for the risk when that is for the advantage of the policyholder and, on the other hand, will be required to return money when, as it develops, the carrying of the risk would have been for its advantage.

By the policy provisions, the dividends were made payable by the company at the same time that premiums were made payable to the company.

As the policy provisions were designed to allow to the policyholder a grace of thirty-one days in the payment of the premium, they also afforded him the same margin of time in the selection of the desired disposition of dividends.

But the thirty one days of grace having expired, the design was that the rights of company and policyholder should become fixed with reference to dividends as well as premium default.

The parties were at liberty to agree as they pleased, no statute intervening, concerning the disposition of the dividends.

The policy provisions upon which they agreed contained many repetitions of the expression, or its equivalent, that "Dividends • • • shall be payable in cash." These are in contrast with repeated expressions that dividends may be applied in the purchase of paid up additions, or may be allowed to accumulate with the company at interest, and with repeated other expressions that the cash surrender value may be applied to the purchase of term insurance upon premium default, or may be applied to the purchase of paid up additions. The language that "dividends • • • shall be payable in cash" is plain, everyday language. There can be no question that ordinary men would understand by such language that dividends should be paid or payable in money of the country, and not in some form of substituted insurance contract.

The policy provisions in articles 11, 12, 17, 18, 19 and 20 hereinbefore quoted indicate a careful attempt to distinguish between the payment of dividends in cash and the use of dividends to purchase some form of substituted contract from the company an attempt to specify just when the dividends may or shall be applied to the purchase of such a substituted contract, and when, on the other hand, they shall be paid in cash.

Undoubtedly, in a business as highly competitive as life insurance, such attempt at distinction and specifica-

tion was designed to accord with the wishes and the interests of insurance buyers.

The automatic provision for payment of the dividend in cash, with which we are concerned in this case, is a provision applicable to the contingency that the premium has not been paid and that the policy itself has lapsed, and that the policyholder has selected no other disposition of the dividend. What fairer provision to the policyholder could there be? He has the right within the thirty-one days of grace to indicate, within the range of options allowed to him (but it will be recalled that the purchase of term insurance is not one of such options), how the dividend shall be disposed of. His omission to select some other disposition is in itself an indication of his acceptance of, and satisfaction with, the automatic provision, namely, payment in cash.

The policyholder who voluntarily has relinquished, or who, from reduced financial circumstances, has been compelled to relinquish, a policy of insurance, may profit more from a cash payment, though small, than from a substituted insurance contract continuing for only a short time.

Especially may he so profit when, as here, **he** receives the dividend (Tr., p. 89, Art. 25), whereas the substituted insurance contract advantages only his beneficiary.

The policyholder has the right and the means of determining which is the better bargain for himself. His omission to select some other disposition is an indication of his decision to accept cash.

Had he desired to receive the cash and to apply it in reduction of the lien against the policy, he could have done so. He chose not to do so.

He did not **owe** the policy lien. It was not indebtedness. It was a mere lien. A desire to apply the dividend on such lien, in the case of a lapsed policy, would be most extraordinary. It would not be the natural or expected expression of ordinary human nature.

Mr. Justice Holmes, in Orleans Parish v. New York Life Ins. Co., 216 U. S. 517, said:

> "The so-called liability of the policyholder never exists as a personal liability, it never is a debt, but is merely a deduction in account from the sum that the plaintiffs (the insurance companies) ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have mentioned, but the item never could be sued for, any more than any other single item of a mutual account that always shows a balance against the would be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. **In substance it is extinct from the beginning,** because, as was said by the judge below, **it is a payment, not a loan.**"

Wagner v. Thieriot, 197 N. Y. S. 560, affirmed by the New York Court of Appeals, 142 N. E. 295, is to the same effect.

It is plain that the company has attempted, in the various instances in which the policy of the company provides that dividends shall be payable in cash, to definitely fix and establish that cash as the limit and extent of its liability. It arranges and conducts its business, reports its liability and distributes its dividends on that basis.

Any decision disrupting this business arrangement and conduct and requiring the company, in addition to the payment of the dividend in cash, also to substitute term

insurance whenever, as it subsequently develops, that would be to the advantage of the policyholder, would be destructive of business stability, as well as of legal principles.

No policy provision contains any promise whatever that a dividend may be applied to the purchase of term insurance. The options were that dividends might be withdrawn in cash, or applied in payment of premiums, or applied to the purchase of paid-up additions to the policy, or left with the company to accumulate at interest until the maturity of the policy, subject to withdrawal in cash at any time. No ground exists in law or morals for requiring the company to grant as a substitute, after the death, a contract of term insurance which shall cover the death.

No one of the options open to the policyholder was specified by him.

If the policyholder, on some prior occasion, instead of using, as he did, the dividends, had declared to the company that he would allow such dividends to accumulate with it at interest until the maturity of the policy, then any dividends accumulated under this selection of option would, under article 11 of the policy, in the event of subsequent premium default, have been usable, at the option of the policyholder, in connection with the cash surrender value, for the purchase of term insurance.

But the policyholder, instead of allowing dividends to accumulate, had used the same; he had never notified the company that he desired or would permit dividends to accumulate with it at interest until the maturity of the policy. The dividend in question became subject on June 10, 1931, to the disposition, and choice of disposition,

of the policyholder, and so remained during the thirty-one days of grace, but at the expiration of that time, no disposition or choice having been made, the dividend became an obligation definitely payable in cash, and not otherwise. The plaintiff's claim that it should have been immediately applied to the purchase of a term insurance contract is utterly inconsistent with any actual or authorized accumulation at interest until the maturity of the policy.

To sanction such a claim would do violence to both contract and morals.

Further, the plaintiff claims that the dividend of June 10, 1931, should be treated as a "paid-up addition" to the policy. But he points to no ordinary or everyday usage anywhere constituting a dividend a "paid-up addition." Both the word "paid-up" and the word "addition" are wholly foreign to the conception of dividend. Obviously, "paid-up addition" is a term of the insurance business, and the uncontradicted evidence leaves no doubt whatever that such term neither has, nor ever has had, any other meaning than a paid-up addition to an insurance policy purchased with a dividend—the terms "paid-up addition" and "dividend addition" being synonymous.

In Gardner v. National Life Ins. Co., 1931, N. C., 161 S. E. 308, the plaintiff contended, as here, that the company should have applied a dividend to the purchase of term insurance so as to extend a lapsed policy to a date past the death of the insured. The cash surrender value of the policy less the indebtedness left a sum of $2.31, which was applied to the purchase of term insurance, but which did not extend to the death of the policyholder. It was essential to the plaintiff's purposes that she show that some additional sum should have been applied by the company to the purchase of such term insurance. The divi-

dend option provisions of the policy were very similar to those in the present case. The policyholder had elected at the time of applying for the insurance that the dividends should be "left with the company at interest unless otherwise ordered." One dividend had accrued and had been paid to him in cash. The second dividend accrued at the same time that premium default occurred. The company retained this dividend. The plaintiff claimed that it should have been applied to the purchase of term insurance. The policy in that case did not provide that dividends left with the company to accumulate at interest until the maturity of the policy should be usable in the purchase of term insurance.

The Court said:

> "The policy provides that, unless the insured shall elect otherwise prior to thirty days after any dividend is due, the same shall be held by the company, at interest, to be withdrawn by the insured at any time, or to be included in any cash settlement of the policy. Although he had notice of the dividend due on May 11, 1930, and of his right to direct its application to the payment on the premium due on said date, or to the purchase of extended insurance, the insured did not order such application. He elected that the dividend should remain with the defendant, at interest, in accordance with his direction given in his application for the policy. In view of the express provisions of the contract between the insured and the defendant, as clearly and plainly expressed in the policy, the defendant had no right, in law or in equity, to apply the dividend declared prior to May 11, 1930, and due at said date, as a payment on the semiannual premium due on May 11, 1930, or to the purchase of extended insurance. If in violation of its contract with the insured, with respect to this dividend, the defendant had so applied it, it would

have, nevertheless, been liable to the insured for the amount of the dividend, with interest, when called upon by him for its payment. There is no principle of law or equity upon which the defendant can be held liable to the plaintiff because after the death of the insured within the time for which the policy would have been extended, if the insured had directed that the dividend be applied to the purchase of extended insurance, it appeared that such application would have been to the interest of the plaintiff, as beneficiary in the policy."

In Hutchinson v. National Life Ins. Co. (1917, Mo. App.), 195 S. W. 66, it was contended that a dividend should have been applied in some way for the purchase of term insurance. The "net value" or "reserve" of the policy was usable for the purchase of term insurance, and it was contended, first, that the dividend was a part of the net value, and, this failing, it was contended that anyhow, on some ground, the dividend should have been used by the company to purchase term insurance. The Court said:

"This brings us to the final claim that the dividend should be considered as a part of the net value of the policy. The 'net value' at a given time was shown at the trial to be the 'reserve.' This is conceded, and it is the view adopted by the authorities (Rose v. Insurance Co., 153 Mo. App. 90, 132 S. W. 613; Fahle v. Insurance Co., 155 Mo. App. 15, 134 S. W. 60). The statute enacts the process whereby the net value is ascertained and does not include an unpaid dividend. On the other hand, the contract in the policy is that the unpaid dividend is to be applied in part payment of the next annual premium.

"Running through the argument for plaintiff there is to be found a confusion of statement as to the application of the dividend of $19.12, declared by de-

fendant on the 31st of December, 1913. First is the insistence that it should be applied to the payment of the premium, then follows an assumption that the dividend, thus applied, bought extended insurance. We think that does not follow. The two things are wholly disconnected and distinct matters. A sum which is to be used in payment of premiums becomes a part of the premium fund, and pays, or helps to pay, the premium which buys the regular insurance, and furnishes no part of the fund which purchases extended insurance, except as it may do so indirectly by forming a part of the reserve. The fund which buys the latter insurance is provided by law, and is ascertained after the manner pointed out in the statute; while the former is provided for by the contract, and contemplates a continued live contract. The latter is attached by law to prolong the life of a contract which, if left to its own terms, would be ended by forfeiture. Plaintiff truly says, at page 10 of the brief in her behalf, that 'the policy provided that the dividend of $19.12 should be applied as a credit on the premium.' But it is immediately added that this, at the rate per day, 'carried the insurance 118 days,' a period long beyond the date of deceased's death. The policy does provide that:

"'Dividends assigned by the company shall be applied to the reduction of each subsequent year's premium, or if the insured prefer to pay any premium or premiums in full, the dividend or dividends will be applied to the purchase of paid-up additions to the policy.'

"But, as deceased did not pay his premium due in May, 1914, this dividend of $19.12, declared the previous December, was automatically credited on that premium, reducing it from $85.75 to $66.63, but still leaving the default. The fact that it was for a less amount does not destroy its force as a forfeiture.

"Plaintiff seeks to deal with this dividend as a separate and distinct payment of a premium for the pur-

chase of extended insurance, carrying the life of the policy beyond the death of the insured. This would not be within the law, and would be outside the terms of the contract, for, as we have seen, it must be merely credited on the annual premium falling due next after the dividend is declared. But there is a provision in the policy that premiums may be paid annually, semi-annually, or quarterly, and it may be suggested that the dividend would apply as far as it would go as a quarterly payment. But the same answer could be made to this as has just been made to a full annual payment. The dividend was not sufficient to cover a quarterly payment, and if, without request from the assured, defendant had credited it as a quarterly payment, it would still have left a default. If a quarterly payment was intended to be made, it, of course, should have been for a full quarter. The defendant could not be required to accept less (Terry v. Ins. Co., 90 S. C. 1, 72 S. E. 498).

"The fact that the lawmakers, in legislating on the subject of extended insurance, have failed to provide in terms that upon default in payment of premiums, when there were dividends declared but not paid or applied, the amount of such dividends should be used in the purchase of extended insurance, is apparently conclusive that it was not intended that they should be used for that purpose. The contract provides for only two uses of unpaid dividends, one as a credit on the next annual premium, and the other to purchase of additional insurance if the insured paid the annual premium in full; and we have seen that, as the insured did not pay the premium, the dividend could only be applied as a credit thereon."

In the case of Atlantic Life Insurance Company v. Bender (1926, Va.), 13 S. E. 806, dividend options were the same as those provided for in the policy involved in suit.

but the dividends, under an automatic provision, had been applied to the purchase of paid-up additions to the policy. The policy lapsed upon the nonpayment of a premium, and after the death of the insured it was contended that the company should have used the dividends toward the purchase of term insurance. The Court held:

> "This position is not tenable; the dividends had been applied according to the terms of the policies. * * *
>
> "* * * Dividends and cash or loan values of life insurance policies do not belong to insurance unless created by statute or granted by the policies, and in the latter instance **subject to the terms and conditions contained therein.**"

In Toncich v. Home Life Ins. Co. (1932, Pa.), 163 Atl. 673, a payment of $11.40 was due to the policyholder which, under the terms of the policy, might be applied in any one of various ways. But the purchase of term insurance was not one of such methods. The plaintiff claimed that nevertheless the sum should have been applied by the company to the purchase or provision of term insurance.

The Court said:

> "On April 28, 1929, there was due a guaranteed coupon for $11.40 by virtue of a supplemental agreement as follows: 'On the second and each subsequent anniversary date of the policy, provided it be then in force, there will become due and payable in cash a coupon for the amount shown below. The insured, however, may select any one of the three following options: 1. To apply the coupon towards paying the premium then due, by surrendering it and paying in cash the full premium less the coupon.' The two remaining options are not material to this issue. Plaintiff argues that this $11.40 should have been applied

by the company towards a further extension of the policy. The statement of claim contains no averment that insured made any effort to have the coupon so applied. In the absence of any indication by the holder of what should be done, and in view of the four possible dispositions of the coupon, it is difficult to see how appellant can now claim that the coupon had the effect of extending the insurance."

Well-Understood Principles of Life Insurance.

While it seems to us unnecessary, yet for the possible convenience of the Court, particularly in the study of some cases which the plaintiff has cited, it may be well to review briefly some of the well-understood principles of the life insurance business.

It is well known that insurance computations are based on mortality tables.

There are two such tables commonly used, namely, the American Experience Table of Mortality and the Actuaries' or Combined Experience Table of Mortality.

These tables do not differ greatly.

Each table, starting with approximately 100,000 lives at age 10, indicates how many die each year. According to each table, all die before age 100. The last three die at age 95, according to the first table, and the last one at age 99 according to the second table.

It is also well known that all computations are likewise based on an assumed rate of interest, such rate being now generally 3½ per cent.

In order that there may be common basis for calculations, American practice assumes that premiums are received at the beginning of the year, and that deaths occur at the end of the year.

Hence, given the exact dates when deaths will occur, and when premiums will be paid, and the exact interest return that will be regularly received and annually compounded, each dollar being immediately invested and kept invested until disbursed on account of death, and disregarding expenses and losses and all contingencies, it is a simple mathematical problem to compute to the penny the amount of premiums that must be paid in order to meet the deaths as they occur.

These mathematically exact and requisite premiums are called "net premiums."

But as some additional charge is essential for expenses, a "loading" is placed on the net premium, and the sum constitutes the "gross premium."

It is well known that as the individual advances in age, the chance that he may die within the next twelve months increases each year. The mortality cost of insurance increases with each added year of age.

If the individual were charged each year a premium exactly sufficient, neither more nor less, to defray the mortality cost of his insurance for such year, the amount of the premium would increase from year to year.

But, as it has been found practically necessary or desirable that premiums be not thus increased from year to year, but be fixed at a level figure, it necessarily follows that this level figure must be greater than the mortality cost during the early years of the insurance, and less than the mortality cost during the later years of the insurance, the excess portions during the early years compensating for the deficits in the later years.

Hence, upon every level premium policy, the excess por-

tions or savings, from premiums and interest, accumulate from the beginning.

If still, regardless of the insurer's actual experience with mortality cost and return on investments and expenses, it be assumed that deaths have occurred just as pointed out by the mortality table and that premiums have been continuously invested at the assumed rate of interest, it is, as before, a mere mathematical problem to compute the accumulated savings, per $1,000 of insurance, at any date that may be desired.

The sums thus mathematically computed per $1,000 of insurance constitute the amount of the insurer's "reserve" against such policies.

The insurer is required by law, as a test of its solvency, to maintain such reserve. If its experience has been less favorable than the required standard of table of mortality and assumed rate of interest, the difference constitutes a loss in operation. If its experience has been more favorable than the required standard, the difference is a profit from operation, which may be distributed in the form of dividends.

These "reserve" amounts constitute that which has been paid in excess of the requirements of the assumed table of mortality and rate of interest, and thus represent to the policyholders the value of their policies.

In addition, the difference between the present worth, according to the table of mortality and the assumed rate of interest of all the premiums yet to be paid by a policyholder under his existing policy, and the present worth, similarly computed, of the premiums which he would have to pay on a new policy of the same type at his increased attained age, is exactly the amount of this "reserve."

The terms "reserve" and "value" or "net value" as applied to a policy are interchangeable. They designate precisely the same amounts.

As a test of its solvency, a life insurance company must have on hand the amount of the "reserve" against its outstandard policies, or the "net value" of its outstanding policies, computed in accordance with the table of mortality and assumed rate of interest which it uses, or which has been adopted as a standard by statute.

In its statement of assets and liabilities, a life insurance company charges itself with a liability equivalent to the "reserve" against, or the "net value" of, its outstanding policies.

The loan values and cash surrender values of policies are fixed with reference to such "reserves" or "net values."

They are within the amount of the reserves or net values, but usually constitute the reserves or net values less a surrender charge varying in amount.

The surrender charge is made for the trouble of the transaction, and, also, for the injury to the company, by way of adverse selection of risks, involved in the surrender, it being thought that, as a general rule, only the good lives surrender their policies, whereas the impaired risks are certain to continue their policies in force to the end.

An insurance company may be able to invest its funds so as to yield more than the assumed rate of interest; also, it may select its policyholders in suchwise as to effect a mortality cost less than that of the assumed table of mortality. In each case the company makes a profit.

Also, it may effect a saving in expenses from the "load-

ing" added to the net premium. Such savings augment its profit account.

From this profit account it declares dividends.

Thus, reserves and net values are entirely separate and distinct from dividends, and vice versa.

At intervals in the history of insurance, some one or more companies, particularly small companies desirous of "window-dressing" their policies to make them seem more attractive to the buyers, have issued policies containing provisions for the payment of "guaranteed dividends." These so-called "guaranteed dividends," sometimes represented by coupons, sometimes covered by a provision in the policy, are, in fact, misnomers. They are definite obligations for the payment of specific sums of money; and corresponding charges for them necessarily enter into the make-up of net premiums on the policies. For such obligations, as well as for the obligations to pay sums at death, the mathematically exact "net premiums" chargeable for the same, according to the adopted table of mortality and assumed rate of interest, of course may be computed, and, likewise, the "net value" or "reserve," as of any date, against such obligations. Both statute and company practice require the maintenance, as a test of solvency, at all times, of such "net value" or "reserve" against such contracts.

There are several well-known forms or types of insurance policies.

The first is the ordinary life type, which provides for the payment of premiums annually throughout life and for the face of the policy payable upon death.

Second, there is a limited payment type, which provides

for the face of the policy to be payable at death, but for the payment of premiums for only a limited number of years, for instance, for five years, ten years, fifteen years, twenty years; such policies being commonly known as five pay policies, ten pay policies, fifteen pay policies, twenty-pay policies.

A third type of contract is the endowment type, which provides for the face of the policy to be payable at death, but also provides for the face of the policy to be payable at the end of a specified period of years, if this precedes death. Such period of years may be five, ten, fifteen or twenty years, and such policies are commonly known as five year endowment, ten year endowment, fifteen year endowment and twenty year endowment policies.

All of such policies ordinary life, limited payment life and endowment policies are issued at level premiums, and hence all accumulate reserves from the beginning.

The premiums upon these policies naturally differ.

The fewer the premiums payable, or the sooner the policy is payable, the greater the premium rate.

The premium on a ten-year endowment contract is higher than the premium on a ten-pay policy issued at the same age, and the latter is higher than the premium on an ordinary life policy at the same age.

Another type of insurance exists, designated as term insurance. Under this type the face of the insurance is payable only in the event death occurs within a specified term, usually short—one year, two years, etc. At the end of that term the policy is at an end. There is nothing left—no cash surrender value, no reserve. The amount of premium charged is just sufficient to discharge the mortality cost for the term.

In consequence the premium is extremely low. An individual rarely wishes to insure himself against the risk of death occurring solely within a short period of time. He prefers a policy which he may maintain until he dies. Hence, little demand exists for the term policy.

Similarly, the insurance is unattractive to an insurance company. It involves the greatest amount of liability for the least premium. There is nothing from which unexpected mortality, losses in investments or expenses may be made good. It involves disproportionately heavy expense, in relation to the premium, to place the business on the books.

Hence, term insurance is not featured by any of the companies. Indeed, it is not offered generally on the market. It is reserved for writing to cover preferred risks in special circumstances.

Practically the function of term insurance is limited to its purchase with cash surrender values, upon default premium payment, as a means of giving these values in some manner to the policyholders.

Where surrender values of ordinary life, limited payment life, or endowment policies are thus employed the ordinary life, limited payment life and endowment policies are not themselves extended, but they or their values are employed in the purchase of a different and cheaper form of insurance.

Computation of Insurance Reserves or Net Values and Premiums.

We may illustrate the computation of insurance reserves or net values as follows:

Let us take the tail end of the American Experience

Table of Mortality. Of the 100,000 lives at age 10, with which the table starts, all have died by the beginning of the age 90, save 847. According to this table, the number living and the number dying each year after age 90 are as follows:

Age	Number Surviving at Commencement of Year	Deaths During Year
90	847	385
91	462	246
92	216	137
93	79	58
94	21	18
95	3	3

Let us assume that the 847 persons living at the beginning of the year, age 90, take out each a policy of $1,000 on his life, payable at death, requiring the payment of premiums annually during life. Let us assume a rate of interest of 4½ per cent, and that the annual premium required from each is $494.32. In fact, the exact premium required is nearly one half of a cent greater than that, or about $494.32½.

It is to be remembered that in all American insurance calculations it is assumed that the premiums are paid at the beginning of the year, and that deaths occur at the end of the year.

Hence the 847 persons living at the beginning of the year, age 90, pay at that time premiums of 847 × 494.32, or $418,689. This sum, improved at 4½ per cent interest, amounts at the end of the year to $437,530. At that time, according to the table, 385 deaths occur, requiring the payment in policies of $385,000, and, after deducting this

sum from the fund in hand, there is left $52,530. This balance is the exact sum which the policyholders have paid in, plus the interest on the same, and less the cost of insurance for the year; and, as it is the saving or reserve on account of the policies of the 462 surviving members, the reserve of each policy is 1/462 of $52,530, or $113.70.

Now, this sum is not only the saving or reserve on account of each policy, but is also the exact difference between the payments that the member will thereafter have to make on his policy issued at age 90 and those which he would have to make on a new policy issued at age 91. That is to say, if he entered at age 91 the annual premium would be greater than $494.32, and the present worth of the excess of such future annual premiums over $494.32, the premium at age 90, is exactly $113.70. Hence this amount is both the reserve and the **value** of the policy at the end of the year, age 90; because it represents both what has been saved or reserved for the future on account of the policy and the difference between what the policy will cost in the future and what a new policy would cost. The two are always the same.

Starting at the beginning of the year, age 91, with a fund of $52,530, there is added to it immediately the premiums paid by the 462 surviving members (462 × 494.32), amounting to $228,376, and these two sums improved with 4½ per cent interest amount at the end of the year to $293,547. At that time, according to the table, 246 deaths occur, and $246,000 must be paid in policies, thus reducing the fund to $47,547. As this fund is now held on account of only 216 policies, the reserve, or net value, of each is 1/216 of $47,547, or $220.12.

At the beginning of the year, age 92, the 216 surviving members pay in premiums 216 × 494.32, or $106,773, and

this, added to the balance of $47,547 at the end of the previous year, amounts to $154,320, and this sum, improved with 4½ per cent interest, amounts at the end of the year to $161,264. At that time, according to the table, 137 deaths occur, and, therefore, $137,000 must be paid out in policies, leaving a balance in the fund of $24,264. As this fund is held on account of only 79 policies, the reserve or net value of each is 1/79 of $24,264, or $307.14.

At the beginning of the year, age 93, the balance of $24,264 is augmented by the premiums paid by the 79 members (79 × 494.32), amounting to $39,051, and these two sums, improved with 4½ per cent interest, amount at the end of the year to $66,165. At that time 58 deaths occur, and accordingly $58,000 must be paid in policies, reducing the fund to $8,165. But as this fund is held on account, now, of only 21 policies, the reserve, or net value, of each is 1/21 of $8,165, or $388.81.

At the beginning of the year, age 94, the balance of $8,165 is increased by the premiums paid by the 21 members (21 × 494.32), amounting to $10,381, and these two sums, improved with 4½ per cent interest, amount at the end of the year to $19,380. But, as 18 deaths then occur, requiring the payment of $18,000 in policies, the balance remaining is only $1,380. This sum, however, is held on account of only 3 policies, and, therefore, the reserve, or net value, of each is one-third of that amount, or $460.

At the beginning of the year, age 95, the three surviving members pay in premiums 3 × 494.32, or $1,482.96, and this sum, added to the balance of $1,380, makes a total fund in hand at the beginning of the year of $2,862.96. This sum, improved at 4½ per cent interest, amounts at the end of the year to $2,992, lacking only $8 of enough to discharge the $3,000 of policies maturing at that time.

This difference of $8 is accounted for by the fact that we have used as the premium $494.32, whereas the amount is more nearly $494.32½. In the calculations we have included 1,628 premiums, and a difference of one cent in the amount of each premium, that is, a premium of $494.33 instead of $494.32, would have increased the fund by $16.28, disregarding interest, thus producing a surplus, with interest, of probably $10.

The statement made above, that the net value of a policy is the difference between what it will cost the policyholder in the future and what a new policy would cost him, that is to say, the difference between the present worth of the premiums yet to be paid on the policy and those necessary to be paid on a new policy taken at the attained age, is applicable to a policy that has become paid up, as well as to a policy on which premiums are continuing. For instance, on a policy that has become paid up, the policyholder has no more premiums to pay, and, therefore, the net value of such a policy at any date is the present worth of the payments that he would then have to make on a new policy, or, which is the same thing, the single premium that he would then have to pay for a paid-up policy.

Article 3050 of the Revised Statutes of Texas of 1895, which was dropped from the Statute in 1909 as unnecessary, though the term "net value" is continuously employed (Articles 4682, 4688, Revised Statutes of Texas 1925), contains an accurate definition of "net value," as follows:

> "The net value of a policy at any time shall be taken to be the net single premium which will at that time effect the insurance, less the value at that time of the future net premiums called for by the table of mortality and rate of interest designated above."

Of course, where there are no premiums to be paid the net value is the net single premium itself without deduction.

It may be well for us to illustrate here how annual premiums and net single premiums are determined. We have seen that an annual premium of $494.32 is just sufficient at age 90 to enable the company to pay the losses as they mature, in accordance with the table. But how is that figure ascertained?

Since the object is that the premiums and interest to be received shall just equal the losses to be paid, it is necessary to calculate at the beginning of the year, age 90, the present worth of all losses to be paid in the future and the number of premiums, or, rather, the present equivalent of the number of premiums, to be received in the future, and then to divide such equivalent number of premiums into the present worth of the losses, and the result must be the amount of each premium.

For instance, the present worth at the beginning of the year, age 90, of the losses to be paid in the future, each discounted at four and one-half per cent compound interest, is as follows:

$385,000 to be paid in 1 year has present worth of	$368,421
246,000 to be paid in 2 years has present worth of	225,270
137,000 to be paid in 3 years has present worth of	120,053
58,000 to be paid in 4 years has present worth of	48,637
18,000 to be paid in 5 years has present worth of	14,444
3,000 to be paid in 6 years has present worth of	2,304
Total present worth of losses	$779,129

Similarly, the equivalents now of the number of premiums to be paid in the future, such numbers being discounted at four and one-half per cent compound interest, are as follows:

847 premiums to be received now are equal now to.....	847	premiums
462 premiums to be received in 1 year are equal now to.....	442.105356	premiums
216 premiums to be received in 2 years are equal now to.....	197.797680	premiums
79 premiums to be received in 3 years are equal now to.....	69.227463	premiums
21 premiums to be received in 4 years are equal now to.....	17.609781	premiums
3 premiums to be received in 5 years are equal now to.....	2.407353	premiums
Present equivalent of premiums to be received in future.....	1,576.147633	

The amount of each premium to be received, therefore, is ascertained by dividing $779,129, the present worth of the losses, by 1,576.147633, the present equivalent of the number of premiums, and the result is $494.3248, which is the amount of each annual premium.

The net single premium at age 90 for $1,000 of insurance is as easily calculated from the foregoing figures. Since the present worth of all the losses to be paid is $779,129, and since these losses cover the 847 lives in being at the beginning of the year, age 90, the single premium necessary to be paid by each to provide for such losses is 1/847 of $779,129, or $919.858.

Now, having ascertained how to compute the net single premium at any age, and how to obtain the present worth of premiums to be paid in the future on any policy, let us inquire whether the figure of $113.70, which we have seen

is the reserve at the end of the first year of a policy issued at age 90, is also the difference between the present worth of all premiums remaining to be paid for the policy and the net single premium for new insurance taken at age 91.

The present worth of the losses to be paid after the end of the year, age 90, is as follows:

$246,000 to be paid in 1 year has present worth of	$235,407
137,000 to be paid in 2 years has present worth of	125,455
58,000 to be paid in 3 years has present worth of	50,825
18,000 to be paid in 4 years has present worth of	15,094
3,000 to be paid in 5 years has present worth of	2,407
Total present worth of losses to be paid	$429,188

As these losses cover the 462 lives surviving at the end of year, age 90, the single premium necessary to be paid by each to provide for the losses would be 1/462 of $429,188, or $928.97.

New premiums would remain to be paid by the policyholders joining at age 90 as follows:

462 premiums immediately, being equal immediately to	462	premiums
216 premiums in 1 year being equal now to	206.698608	premiums
79 premiums in 2 years being equal now to	72.342670	premiums
21 premiums in 3 years being equal now to	18.402237	premiums
3 premiums in 4 years being equal now to	2.515683	premiums
Present equivalent of number of premiums to be paid in future	761.959198	premiums

As each of these premiums will be of the same amount previously fixed, to wit, $494.32, the present equivalent of the total amount to be paid will be 761.959198 × 494.32, or $376,651. And, as there are 462 persons surviving at the end of the year, age 90, by whom these premiums are to be paid, the amount to be paid by each, that is to say, the present worth of the premiums to be paid by each is 1/462 of $376,651, or $815.26.

Deducting this sum, $815.26, the present worth of the premiums to be paid by each policyholder, from $928.97, the net single premium at the attained age for new insurance, the difference is found to be $113.71, which is the net value of each policy at that time. This figure, it will be noted, is within one cent of the figure previously named as the reserve, the difference being due merely to the elimination of fractions.

SECOND PROPOSITION.

The company's contractual obligation to pay the dividend of $74.80 of June 10, 1931, in cash to the policyholder rather than to substitute therefor term insurance for a brief period in favor of the former policyholder's beneficiary was not in contravention of the terms of any Texas statute.

STATEMENT AND ARGUMENT.

A statute of Texas contains the term "dividend addition," which corresponds with the term "paid-up addition" used in the policy.

The plaintiff's contention is that the dividend of June 10, 1931, should be treated as if included in the term "dividend addition."

The statute referred to is Article 4732 of the Revised Statutes of Texas of 1925, which specifies certain provisions the substance of which shall be contained in policies of life insurance issued in Texas.

Though subdivision 7 of the article is the one presented by the plaintiff, yet the term "dividend addition" is repeatedly used in both subdivisions 6 and 7 and consequently we set both forth with such explanatory matter as is deemed proper, as follows:

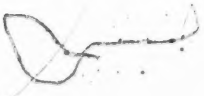
Statute.	Explanatory Matter.
"Art. 4732. Policy shall contain what.—No policy of life insurance shall be issued or delivered in this state, or be issued by a life insurance company organized under the laws of this state, unless the same shall contain provisions substantially as follows:	
• • •	
"6. That after three full years premiums have been paid, the company at any time while the policy is in force,	
will advance upon proper assignment of the policy and upon the sole security thereof	The statutory requirement that the advance shall be upon the **sole security** of the policy doubtless precludes any attempt by a company to demand the personal obligation of the policyholder to repay the amount received from the company.

Statute.	Explanatory Matter.
	The policy provision in the present instance is for a loan "on the sole security of the policy, on assignment thereof" (Tr., p. 87, Art. 19); and the loan agreement consists merely of an acknowledgment of the sum received from the company and an assignment of the policy as security therefor, with a stipulation that if and when the amount received from the company, with interest, shall exceed the cash surrender value of the policy, thereupon the insurance shall cease (Tr., pp. 91-92).
at a specified rate of interest a sum equal to, or at the option of the owner of the policy less than,	
the legal reserve at the end of the current policy year on the policy and on any dividend addition thereto	Observe the expressions "legal reserve" and "dividend addition" as often hereinbefore referred to. The legislative use of these terms implies and makes necessary complete familiarity with the same on the part of the courts. That which the legislature takes cognizance of and requires that the courts shall interpret, courts also must take cognizance of. "Divi-

Statute.	Explanatory Matter.
	dend addition," according to the uncontradicted evidence, means, and always has meant, just one thing, namely, a paid-up addition to the policy purchased with a dividend. It could not mean the dividend itself. A dividend declared immediately payable in cash, or disposable in cash according to some option of the policyholder, is utterly inconsistent with a provision for borrowing such dividend. Also, it is inconsistent with "additions to the policy," which implies something permanently added to the policy. Also, it is inconsistent with "legal reserve on * * * dividend additions," because no legal reserve exists on a dividend. Indeed, "dividend additions" can mean nothing other than that which the uncontradicted evidence of the actuaries indicates — namely, a paid-up addition to the policy purchased with a dividend. On such a paid-up addition there is, of course, a "legal reserve," as the explanation hereinbefore given of the reserve or net value of a policy shows.

Statute.

less than a sum not more than two and one half per cent of the amount insured by the policy, and of any dividend additions thereto; and



that the company may deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year, which provision may also provide that such loans may be deferred for not exceeding six months after application therefor is made. It shall also be stipu-

Explanatory Matter.

Here it will be observed a surrender charge is permitted of 2½ per cent of not only the face amount of the policy, but also the face amount "of any dividend additions thereto." This second use of the term "dividend additions" likewise indicates its similarity in nature to "the amount insured by the policy." If the policy is of $10,000 and the dividend addition is of $152, the permitted surrender charge is 2½ per cent of $10,152. This expression plainly shows that the dividend addition is an increased amount of insurance added to the face of the policy.

Statute.	Explanatory Matter.
lated in the policy that failure to repay any such advance, or to pay interest, shall not void the policy until the total indebtedness thereon to the company shall equal or exceed the loan value. No condition other than as herein provided shall be exacted as a prerequisite to any such advance.	
This provision shall not be required in term insurances, nor in pure endowments issued or granted as original policies, or in exchange for lapsed or surrendered policies.	Here also is legislative recognition of the type of insurance hereinbefore referred to as "term insurance," also of the fact that such type of insurance is radically different from other types referred to. While a paid-up term insurance, such as is purchased with the cash surrender value of a lapsed or surrendered policy, has a reserve or net value, that reserve or net value is continuously depleted during the term, and by the end of the term is entirely exhausted. The reserve on such a policy covers merely the mortality cost of the insurance during the term. When the term expires the insurance is at an end. It has no reserve, no cash sur-

Statute.	Explanatory Matter.
	render value—indeed, nothing.
No provision herein shall compel any company to loan on any policy an amount greater than ninety-seven and one-half per centum of the face value thereof, including net dividend additions thereto.	This provision merely makes certain by repetition the permitted surrender charge of 2½ per cent of the amount insured by the policy and of any dividend additions thereto. This third use of the term "dividend additions" again clearly indicates that it constitutes additional insurance purchased with a dividend, just as the uncontradicted evidence in the case shows.
"7. A provision which, in event of default in premium payments, after premiums shall have paid for three full years,	This subdivision is the subdivision on which the plaintiff relies. The prior subdivision just quoted relates to loans on policies. This subdivision relates to premium defaults.
shall secure to the owner of the policy a stipulated form of insurance,	Observe that the requirement is merely for: **a** or **some** "stipulated form of insurance"—not necessarily "term insurance"; indeed, not any form specified by the legislature but rather on the contrary **any form that may be stipulated by the parties.** A paid-up addition to the policy is a form of insurance, and this, as a rule, is the stipulated form.

Statute.	Explanatory Matter.
	This was the form of insurance stipulated in the present case by the fourth subdivision of Article 11 (Dividend options) hereinbefore copied. The policy provision so stipulating is in exact compliance with the statute.
the net value of which shall be at least equal to the reserve at the date of default on the policy,	Here again are legislative employments of the terms "net value" and "reserve" so often hereinbefore referred to. The reserve (less surrender charge covered by a subsequent clause) is to be used to purchase the "stipulated form of insurance" and the effect of this clause is to prevent the insurer from imposing any loading or charge for expenses for its issuance of the "stipulated form of insurance" because the "net value" of the "stipulated form of insurance" must not be less than the "reserve" purchasing the same. Hence the "stipulated form of insurance" is to be acquired solely for the net p r e m i u m mathematically requisite to be charged for such insurance as hereinbefore explained, and such net premium at the issuance of

Statute.	Explanatory Matter.
	the stipulated form of insurance is exactly the net value of the stipulated form of insurance at such time.
and on any dividend additions thereto,	This is the expression which the plaintiff contends includes the dividend of June 10, 1931. The plaintiff's contention, as hereinbefore often explained, is that a dividend should be treated as a "dividend addition" whereas it plainly appears from the uncontradicted evidence and from the repeated use of this same term "dividend additions," in subdivision 6 of the statute hereinbefore copied that the term "dividend additions" means and always has meant, in the insurance business, merely paid-up additions to the policy purchased with dividends.
specifying the mortality table and rate of interest adopted for computing such reserve,	Here again is evidence of legislative familiarity with the fact that "reserves" are computed in accordance with an adopted mortality table and rate of interest.
less a sum not more than two and one-half per cent of the amount insured by the policy, and of any existing dividend additions thereto,	Here again is legislative permission that there may be deducted from the reserve, as a surrender charge, 2½ per cent of the amount insured by the policy and

Statute.	Explanatory Matter.
	also of any existing dividend additions thereto. Two and one-half per cent of $10,000, the face of the policy in question, is $250. This was the legally permissible surrender charge. The surrender charge employed by the defendant was only $60. Here also in this the fifth use of the term "dividend additions" in subdivisions 6 and 7, it appears again that dividend additions correspond to the amount insured by the policy, that, in other words, dividend additions are additional amounts of insurance purchased by dividends just as the uncontradicted evidence shows.
and less any existing indebtedness to the company on the policy.	Here is legislative permission that indebtedness to the company on the policy may be deducted from the reserve.
Such provision shall stipulate that the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance, as aforesaid,	Here is merely a provision that the cash surrender value shall be payable in cash on surrender of the policy within one month from date of default.

Statute.	Explanatory Matter.
and may stipulate that the company may defer payment for not more than six months after the application therefor is made.	
This provision shall not be required in term insurances."	Here again is legislative recognition of the radical difference between "term insurances" and other insurances as hereinbefore explained.

No argument seems necessary to expose the error of the plaintiff's contention that a dividend declared and ready for payment is a "dividend addition" to the policy. The uncontradicted evidence of the two actuaries offered by the plaintiff conclusively establishes the one meaning which the term "dividend additions" has and always has had among those engaged in the insurance business.

Indeed, no court familiar with the principles of such business could entertain, for a moment, any other idea of the term.

But courts cannot be omniscient, and courts not familiar with the principles and terminology of the business sometimes have evinced confusion over insurance terms, and consequently have been guilty of some errors of expression in their opinions, and also of some, though fewer, errors of substantive decision.

But the business is of such great importance in the national economy and it so intimately affects substantially the whole of the population, that the greatest importance exists that its principles and terminology be clearly un-

derstood whenever a subject matter is involved that affects, in principle, not one policyholder only, and not one contract only, but the entire business.

A question sometimes has been suggested whether an attempt should not be made by witnesses to develop, upon the trial of a case, a full explanation of the principles and of the terminology of the business. But the frequency with which a familiarity with such principles and terminology is required for the determination of controversies precludes the introduction of such evidence on each occasion, and the crowded condition of trial court dockets and the circumstances surrounding trials in courts of first instance are quite unfavorable for the introduction of such evidence on any occasion. Indeed, in any case, offered evidence of such character, unless quite limited in its scope (as was the evidence of the actuaries here—such evidence being limited to the signification of the terms "dividend additions" and "paid-up additions"—the issue regarding the same being the only issue intimated on the plaintiff's pleading) would certainly be excluded by the trial judge as irrelevant to any issue in the case.

But the frequency of insurance controversies requiring a familiarity with the principles and terminology of the business, and the vast number of people affected by the business undoubtedly bring such principles and terminology within the realm of judicial knowledge.

And, indeed, the legislative use of insurance terms, which it is the duty of the courts to interpret, makes it necessary for the courts at all times to have a familiarity with the principles and the terminology of the business.

Returning to the subject of the statute presented by the plaintiff, we quote from the Supreme Court of Texas

in Gilley v. Missouri State Life Insurance Company, 116 Tex. 43, 49, 50, 273 S. W. 825, 285 S. W. 807, as follows:

> "The provision of the law which requires that the policy shall secure to the owners a stipulated form of insurance, whether paid-up or extended insurance, designates that such insurance shall be of a net value **equal to** the reserve to the date of default, **less** a sum not more than two and one-half per cent of the amount insured by the policy. The law clearly recognizes the rule adopted by insurance companies, in arriving at the value of the reserve of policies, to first deduct from the excess in current premiums two and one-half per cent of the amount of the policy in the nature of a carrying charge; and, if there be an amount left, it represents the real reserve, which may be used for the purpose of obtaining a loan, paid-up insurance, or extended insurance, as the insured may elect. * * * If this two and one-half per cent be deducted as the law contemplates, and as it must have actually been done by the company, the policy in fact had no reserve value at all."

Thus the Court said, in that case, if the permitted surrender charge of 2½ per cent were deducted from the amount which otherwise was required by law to be paid in cash to the policyholder, or used to purchase a stipulated form of insurance, there was nothing left, and that the statute was inapplicable to the circumstances.

The same condition existed here, even if the plaintiff be indulged in the whole of his contention. In other words, if a computation is made of the figures involved in his contention it will be found that the statute is nugatory, for that if the dividend of $74.80 be added to the entire reserve of $970.00, a sum is obtained of $1,044.80, and if from this sum be deducted the statutorily permitted sur-

render charge of $250.00, a difference is obtained of $794.80, and if an attempt be then made to discharge with this sum the indebtedness of $898.88, it is found that the sum lacks $104.08 of meeting the indebtedness, and, of course, leaves absolutely nothing for payment in cash or for use in purchasing any form of stipulated insurance.

THIRD PROPOSITION.

The pretended evidence of mental incompetency was without probative force to raise an issue of mental incompetency for submission to the jury.

STATEMENT.

A check covering the 1931 dividends due on the policy in suit, as well as other policies issued to P. H. Williams, was sent by the insurance company to their agents at Dallas, Lee & Lee. Such check was returned to the company by Lee & Lee, with a letter dated September 14, 1931, in which they stated that their attorney was preparing to sue Williams for the amount that he owed them on advances that they had made toward paying his premiums in 1930, and that they would have a writ of garnishment issued and served upon the company (Tr., pp. 94-96).

Accordingly, on September 18, 1931, George Lee, attorney for Lee & Lee, went to San Angelo and there met his brother-in-law, Hervey Humlong, a resident of San Angelo, engaged in the ranching and gravel businesses. Williams was on his ranch at the time, about forty-five minutes from San Angelo by automobile. Between 10 and 10:30 in the morning George Lee and Humlong left San Angelo for the ranch, and when they arrived at the ranch they knocked on the front door of Williams' home, but no one responded to the knock. The two then drove further up the ranch,

in the direction given them by Mexicans working on the ranch, for finding Williams. Unable to locate him, they returned by way of the ranch house, and this time Williams went to the door fully dressed and admitted them to the front room of the house, where, according to these two witnesses, a conversation of from half an hour to forty-five minutes, or even possibly an hour, took place, George Lee told Williams that he had come to ask Williams to execute an instrument releasing the dividends on his policies to Lee & Lee in order that they might be credited on the note that he had given to Lee & Lee for the advances on previous premiums (Tr., pp. 149, 150, 145, 146).

Williams replied that he was "peeved" at the company and did not wish to sign the instrument. He said that he was entitled to the dividends, that he did not think he had been treated fairly, and that he didn't feel like giving those dividends to Lee & Lee, although he admitted his indebtedness to Lee & Lee (Tr., pp. 150, 152).

George Lee argued that the dividends really ought to go to Lee & Lee, and that Williams was morally bound to transfer them to Lee & Lee, but advised Williams that the dividends belonged to him unless he was willing to transfer them to Lee & Lee (Tr., pp. 152, 155).

Realizing that Williams was rather irritable and discourteous, and that George Lee was not making much headway with his argument with Williams in the latter's then frame of mind, Humlong injected himself into the conversation, and began to talk with Williams about other matters. As both were interested in ranching and in the oil business, Humlong directed the conversation to such topics. Williams told Humlong where he got his herd of cattle, how he was trying to build it up, and how proud

he was of it. He also mentioned that he had a large amount of oats stored in his bins that he was holding for a better price. Gradually Williams got into a better frame of mind, and George Lee renewed his request and repeated his arguments (Tr., pp. 155 157, 146, 147).

Finally Williams said, "Well, there is nothing to do, I guess, but to sign this thing, but I am sore about it." Thereupon he signed the order directing the payment of the dividends to Lee & Lee, which is set forth on page 150 of the transcript. Williams never did get to where he was delighted to sign the instrument. According to George Lee, Williams did not jump at the opportunity, but gave his consent rather reluctantly. But Williams' attitude had changed from one of hostility to one of pleasantness and courtesy. He walked with Humlong and George Lee to the front gate, where their automobile was parked, and again engaged in more conversation about cattle and such matters (Tr., pp. 156, 146-148).

During the course of the conversation Williams told George Lee and Humlong that he had had his teeth extracted "recently" according to Lee, "the day before" according to Humlong, and he was expectorating some during the conversation, but neither saw him spit up blood. They did not examine the sputum to see whether it was tinged with blood. In the beginning he said that he had been losing sleep and was not feeling well, on account of having had his teeth pulled, and that his gums were swollen. But before they parted he was feeling a whole lot better (Tr., pp. 147, 155).

George Lee testified that Williams understood thoroughly that it was the dividends on all of his policies that he was directing the payment of to Lee & Lee (Tr., p. 152). Williams said that he was not suffering pain, though his

teeth had given him some trouble, that his gums were swollen, and that he could talk only with difficulty. Williams did not show that he was in any pain (Tr., p. 153).

When asked as to the state of Williams' mind, George Lee stated:

> "I did not notice any variation in the intelligence of Mr. Williams' conversation at any time. He seemed to me to be perfectly rational all the way through. I did not notice his closing his eyes or being drowsy or outwardly manifesting any sleepiness. I did not notice any peculiar or unusual, abnormal expression out of his eyes" (Tr., p. 157).

Asked whether he made any observation as to Williams' mental condition during the course of the conversation, Lee replied: "Yes, sir; I observed him very closely." Asked as to what his observation was as to Williams' mental condition, Lee said: "Well, he appeared perfectly normal." The witness observed no forgetfulness on Williams' part and no lack of understanding of the conversation. On the contrary, he testified that Williams seemed to understand the whole conversation, and that he talked rationally (Tr., pp. 151-152).

Likewise, Humlong testified that he did not observe anything in Williams' conversation or in any talk on his part that was irrational. Humlong did not observe any forgetfulness on Williams' part or any unnatural or peculiar look out of the eyes (Tr., p. 147).

The only other two witnesses to testify as to what happened while Lee and Humlong were on the ranch that morning were Mrs. Williams, the plaintiff, and a hired hand on the ranch, Jeff Jordan.

Mrs. Williams testified that the conversation with Lee

and Humlong lasted, "anyway, two hours" (Tr., p. 106). One cannot read her testimony, however, without being impressed that Mrs. Williams had a natural bent for exaggeration.

Mrs. Williams was in the dining room, kitchen and back porch, engaged in preparing dinner. She did not pay any attention to the conversation until she heard the name "Potect" repeated several times, and she knew by that that they were talking about life insurance.

To use her own words, all else that she heard of the conversation was as follows:

> "One man would talk, and then the other would talk. One would say, 'It is this way, Mr. Williams,' and they would talk and talk. Then Mr. Williams would say, 'Well, gentlemen, I am a sick man today; I am not able to do anything today. I will be in town in a few days and see you there.' About the time he would get the sentence halfway out, the other man would start up and say, 'But this is how it is, Mr. Williams,' and by that time the other man would come in."

She knew that the two strangers called to discuss business with her husband. She knew that her husband was discussing business with them. It never occurred to her to enter the room in which the strangers were discussing business with her husband and to inform them that her husband was mentally incompetent and unable to discuss business with them. Nor did it occur to her to interfere with her husband or to dissuade him from transacting business. It did not occur to her that he needed any assistance in the transaction of business. Indeed, she did not testify that lack of mental capacity existed at any time.

In response to an inquiry as to whether she heard her husband say that he would sign, or was willing to sign, Mrs. Williams replied: "I didn't know there was anything concerning signing; I just heard them say those words. Every sentence he would start, he would tell them he was a sick man and was not able to talk to them" (Tr., p. 106).

The house was a small five-room house, the living room being about ten by twenty feet, and each of the other rooms about ten by ten feet. As it was a hot day, everything was open, and Mrs. Williams, from where she was working, saw her husband sitting in a big rocking chair, "kinda stooped down this way" part of the time, and part of the time moving around. A little after the two men left she went in there and found that Mr. Williams was "just slumped down in his chair, like this, down and out." She took him by the arm and helped him up. He said that he did not want any dinner, but she insisted that he take some coffee, which he just tasted. He sat down on the bed and took "some aspirins." She took his temperature, and found that it was between 102 and 103 (Tr., pp. 106-107).

Jeff Jordan came into the house at noon for lunch while the two men were still there. He and Mrs. Williams waited a while, and then they had dinner. He was sitting at the table, where he could see Williams, but not the other two men. "They were talking to him about signing some papers. I heard him tell them two or three times 'No'; that he wouldn't do it; that he was not in good shape to sign papers; that he was too sick," was Jordan's testimony as to what he heard.

When Jordan left, about forty minutes after he had arrived, Williams had not given his consent to signing the papers (Tr., p. 117).

On cross-examination Jordan testified:

> "Two or three times I heard something about signing papers, or Mr. Williams saying he didn't want to sign some papers. He was sitting at the table when I heard that. Mrs. Williams was at the table, too. I suppose that she could have heard anything I heard then" (Tr., p. 119).

So it appears that while Mrs. Williams and Jordan were both at the same table, the only thing of the whole conversation Jordan heard was about the signing of papers, and Mrs. Williams didn't hear anything about the signing of the papers, though Jordan said that she, being there at the same table with him, could have heard what he heard.

Neither Mrs. Williams nor Jeff Jordan testified that P. H. Williams was out of his mind or conversed irrationally at any time on that same day, to wit, September 18, 1931, or on any other day. Neither testified that he was flighty, or under the influence of a drug, or that he failed to recognize anyone. In fact, neither witness testified that there was anything the matter with Williams' mind either before, during or after the conversation of September 18, 1931.

We glean from other portions of Mrs. Williams' testimony that she and P. H. Williams had been married for about thirty years; that he was working in the oil fields as a day laborer when she married him, and that he was connected with the oil business most of their married life; that, commencing in 1918, he bought machinery and drilled wells either for other people or for himself; that later he drilled for himself a well at Big Lake and made quite a bit of money; that when he sold his lease there he

bought the ranch on which they later lived; that he had about 1,000 acres, one-half of which was in cultivation and one-half in pasture, on which he had some live stock (Tr., pp. 103, 104).

Mrs. Williams related that her husband had been a sick man since the spring of 1931; that he was much worse from the middle of August, when he was kicked in the abdomen and other portions of his body by a bull yearling; that he was bothered with hiccups from then on until he died. She testified that after the injury in the middle of August he was not able actively to pursue his business of farming and ranching (Tr., p. 103). But from other witnesses of the plaintiff we shall see that he continued to give directions to the ranch hands.

Between September 10th and September 16th, Williams went through Dr. Nibling's clinic, where X-ray pictures were made of him, and where his sputum and urine were examined. His urine showed some sugar. As a result of the X-rays and the history given, Dr. Nibling's diagnosis was that Williams had trouble with his liver and gall bladder, either malignant or serious, and that it could have been cirrhosis of the liver or cancer of the liver. Dr. Nibling was also of opinion that Williams was absorbing pus as the result of infection around his gums and teeth, and he advised that the teeth be pulled (Tr., pp. 109-111). Accordingly, Dr. Chase pulled, on the morning of September 17, 1931, fourteen teeth, all of the teeth that Williams had. Dr. Chase found that some of the teeth were abscessed and that there was considerable bone destruction. He administered "anaesthesia" before extracting the teeth, and he observed that Williams had a nervous condition and that his physical condition was not good. He did not testify that he observed that anything was the matter with Williams' mind (Tr., p. 109).

After the teeth were pulled Williams returned to his hotel in San Angelo, but being nervous and restless, he, with his wife, drove back to their farm after sundown (Tr., p. 105).

Mrs. Williams testified that Williams had practically no rest or sleep the night of the 17th; that he was bothered with hiccups all night, and that his teeth bled "terribly" all through the night; that he wouldn't eat that night or the next morning, and that the next morning he had fever between 101 and 102 (Tr., p. 105). She testified that on discovering, after the conversation with George Lee and Humlong, that her husband had fever around 102 or 103, she had her son come for them, and they took Williams back that afternoon to San Angelo, to the hotel. They were unable to get Dr. Nibling, but about 11 o'clock that night (Tr., p. 121) a Dr. McAnulty gave Williams a hypodermic because of the hiccuping. According to Mrs. Williams, his teeth had bled "almost in a stream" the whole time, from the time they had been pulled out. After the hypodermic Williams evidently went to sleep, because he waked up about 3 o'clock on the morning of the 19th with the hiccups and with his teeth bleeding "almost in a stream;" and a nurse in the hotel, upon instructions from Dr. Nibling, packed his gums (Tr., p. 107).

Dr. Nibling testified also that on the 20th and 21st of September he saw Williams, and that Williams was nervous and more or less unstrung; that Williams was spitting blood and sitting on the edge of the bed, and had a bucket by the bed where he could expectorate; that Williams wouldn't lie down, and that he only tried to make Williams comfortable with respect to his pain by giving him a hypodermic. Dr. Nibling testified that the condition of Williams' teeth and their extraction was calculated to

cause a general upset of Williams' whole mechanism, and a more rapid absorption of pus for the time being. He added that a poisonous condition upsets the mental equilibrium (Tr., pp. 111, 112).

Dr. Nibling was cross-examined as to what he found concerning Williams' mental condition on the occasions of his various physical examinations and consultations, and, though he was a witness for the plaintiff, his testimony on cross-examination was so frank and important that we now quote it:

"Q. Did you observe anything abnormal about his mind at that time (September 16th)?

A. Not in particular.

Q. Did you observe anything abnormal about his mind the day before that, or the day before that?

A. No, sir. Nothing abnormal that you could put your finger on. **He talked sensibly.**

Q. Do you remember any topic of conversation carried on between the two of you?

A. No, sir; I don't know, other than his ailments—his condition.

Q. As far as you knew, he was mentally sound at the time you examined him?

A. At that time; yes, sir.

Q. And at all other times that you examined him?

A. Yes, sir; that is right.

Q. Was he mentally sound on the 20th and 21st of September?

A. He was a sick man, but **he appeared to be in his right mind.**

Q. He was suffering pain, but **you noticed nothing the matter with his mind** on any of those days?

A. **No, sir; I did not**" (Tr., pp. 112, 113).

Williams changed doctors about October 1st and thereafter had Dr. Marberry (Tr., p. 108). Dr. Marberry had

no X-rays made, but diagnosed the case as cirrhosis of the liver and abdominal dropsy. He testified that when there is a good deal of infection, and the blood vessels become distended, and the patient has to be tapped in order that the poison may be drawn off, there is a reaction that enfeebles the whole system, both body and mind. He had to tap Mr. Williams two or three times to draw off the fluid. He testified that his treatment was only a palliative measure, because Williams was in a manner dead during the time he treated him, and Williams died two weeks after the doctor first saw him (not when Williams first went to see the doctor; he walked to the doctor's office [Tr., p. 135]). On cross-examination the witness admitted that before the disease reaches such an acute stage that the patient has to be tapped, the patient's condition varies, and that he will have his "ups and downs." Dr. Marberry did not attempt to testify as to what P. H. Williams' mental or physical condition might have been on or about September 18, 1931, and, of course, he did not see him till September 30, or October 1, 1931 (Tr., pp. 113-116).

At his death Williams was only 55 years of age, having been born December 10, 1875 (Tr., p. 162).

The witness Jordan testified to noticing a change in Williams after the bull injury; that Williams didn't seem like himself; that he would be sitting around and studying "a right smart"; that he might take several minutes before answering something said to him by Jordan; that he would tell Jordan to do a piece of work, and later, forgetting the instruction, would want to know why Jordan was doing it; that he would jump on Jordan for not being able to accomplish work that Jordan didn't consider any man could do in the time allotted by Williams. Once Williams and Jordan were counting cattle, and, according to

Jordan, Williams forgot the count and took Jordan's count. After the injury Williams didn't do any physical work, though he did help count the cattle, and he continued to give the men working for him directions now and then, as the previous testimony shows (Tr., pp. 116-118).

H. G. Whittaker, engaged in the employment and feed business at San Angelo, noticed a physical change in Williams "a good while" before the latter's death. He placed the time of change as being eight to ten months before giving his testimony, which was some two to four months after Williams' death (Tr., p. 119).

Mrs. J. P. Webb, who operated the hotel where Mr. and Mrs. Williams stayed, corroborated some of the details of Williams' sickness, particularly on the night of the 18th of September. She said, moreover, that while Williams was sick there at her hotel she once tried to give him some medicine and he refused to take it and spit the medicine right in her face, and that about eight or ten days before his death he grabbed her by the arm and clinched it and stuck his nails into her flesh (Tr., pp. 120-122).

Jim Mabry, another hired hand on the ranch, narrated the details of the injury from the bull and his observation of a change in Williams' condition during the spring and summer of 1931. In counting the stock he noticed that Williams would invariably find some brute missing that actually was not missing—that he always made a mistake in the count; that he would give orders that he deemed impossible of performance; that he would have the middle of an irrigation ditch cleaned, leaving both ends dirty, and then try to force water down through the ditch; that he would come out to the field in his car and, instead of getting out, as he usually did, he would lean on the steering

wheel and apparently go to sleep, or be in a dazed condition, for from ten minutes to half an hour. After the injury from the bull Williams would walk around where Mabry was working, but he walked with a slight stoop, holding his hands on his stomach. He did not do physical work after the injury, but he continued to give Mabry orders up until the time Mabry left on September 3rd. It had not been Williams' practice to be a regular hand even prior to the injury; he just helped out on special occasions (Tr., pp. 122-124).

George J. Bailey, in the garage business in San Angelo, testified that he noticed a change in Williams in the spring or summer of 1931. He didn't see as much of Williams as he used to. Williams was indebted to him and one day, some four or six weeks before Williams died, Williams intimated to him that he was contemplating ending it all and letting his insurance pay his bills (Tr., pp. 124, 125).

A. E. Henderson, an oil well driller, testified that he drilled for Williams a well near Barnhart, Texas, to a depth of 8,900 feet; that it was a dry hole, and that it must have cost Williams about $150,000. Several days before the well was abandoned Williams realized it was condemned, and said he believed he would get his gun out and let the insurance company pay his debts. Williams, however, didn't do this. He had the dry hole plugged in September, 1930, and in the fall and winter had Henderson drill two more wells that were dry holes, each at a cost of about $20,000. Henderson noticed a change in Williams' condition after the completion of the deep hole in September, 1930. He noticed that Williams aged fast, was not as patient as formerly, and was more given to finding fault about little things. While the last test he ever put down was being drilled, the countershaft and the engine

were out of line. Henderson thought that the countershaft ought to be moved, but Williams insisted that the engine be moved. Henderson ignored instructions and moved the countershaft and didn't move the engine. A few days later Williams came back, noticed the engine had not been moved, and demanded that it be moved, but finally gave up and drove away. Later he came back, started to move the engine, but finally left it where it was. At the end of February the witness and Williams had an altercation, during which Williams struck the witness in the face. At the time Williams was sitting in his car and the witness thought that Williams either made a motion to get a gun or else to unlatch the car door. In the summer and fall of 1931 the witness saw Williams frequently in San Angelo, and Williams appeared to be much broken in spirit and health, to go bent over and absorbed in himself, without noticing other people much. Williams continued to refuse to speak to the witness. Once, in July or August, the witness saw Williams park his car by a bank downtown and then remain in the car for about 45 minutes, slumped over the wheel with his arm on it (Tr., pp. 126-129).

Grover C. Parrish testified that he was an oil well driller, and that he noticed a change in Williams after Williams finished the deep well and lost his money; that after that Williams seemed to age and to be "down and out," and not have much to say to anybody (Tr., p. 129).

Joe Stocks, engaged in the sheep business on a near-by ranch, remembered noticing a change in Williams in the summer of 1931. He noticed that Williams was bothered and worried about business, and was irritable. He recalled that Williams had a difficulty with a boy on his place and that the boy struck Williams over the head with an automobile crank. On one occasion, about June 1, 1931, the

witness agreed to pasture some cattle for Williams, and then Williams forgot about it until the witness reminded Williams of the agreement thirty or forty days later. Then Williams wanted to exchange some grain for the grass in the pasture, and they agreed on a price and he let the witness have 400 bushels. Later, when they went to settle, Williams had charged the witness for only 200 bushels (Tr., p. 130).

There was no other evidence by anyone who had ever seen Williams bearing on Williams' physical or mental condition at the time he executed the order transferring the dividends to Lee & Lee.

Dr. F. S. White, an alienist who had had several years experience with some state institutions for the insane in Texas, and who had operated a private sanitarium for nervous and mental diseases during a portion of the time, was called to the stand by the plaintiff. He was asked a long hypothetical question, containing a statement of some of the facts heretofore narrated, and set out on pages 132-136 of the transcript. The witness was asked to state whether, in his opinion, P. H. Williams, on September 18, 1931, had "the mental power and capacity to weigh and understand and consider the nature and effect of a business transaction," and the witness was asked to base his answer upon the assumed state of facts.

Over the objections of the defendant, the witness answered:

> "I will answer that question assuming all of these statements are true, and, assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper" (Tr., pp. 136-139).

The facts stated in the hypothetical question included none of the conversation that took place between Williams and George Lee and Humlong as narrated by the latter two, or as narrated by Mrs. Williams or Jeff Jordan. In fact, there was no testimony in the record from either Lee or Humlong at the time that the alienist was on the witness stand. The hypothetical statement contained no mention of the fact that on the morning of the conversation Williams was fully dressed and responded to the knock at the door, or that, at the close of the conversation, he voluntarily walked out to the front gate where Lee and Humlong's car was parked and engaged in pleasantries about cattle and other topics before returning to the house. It included a reference to the testimony of Williams' physician, brought out on cross-examination, to the effect that he did not observe unsoundness of mind at some period not stated, but contained nothing to show that such physician, just two days before and just two days after the act of signing, found nothing the matter with Williams' mind when he examined Williams, and that Williams talked sensibly when he was in the physician's presence.

On cross-examination Dr. White, in recounting the facts that he assumed and relied on, recalled testimony to the effect that, during the conversation with Lee and Humlong, Williams said he was a sick man and not in a condition to attend to business, and the alienist said that such testimony showed that Williams "realized his condition." The witness also added that an important factor upon which he based his answer that, in his judgment, Williams was not in a condition to know the nature and effect of the signing of the instrument, was the fact that Williams had been bleeding "for two or three days—something like that—and rather extensively." There was no statement in the

hypothetical question, or in the evidence, that warranted the doctor's assumption of extensive bleeding for two or three days prior to Williams' act of signing the instrument (Tr., pp. 141-143). Williams' teeth were extracted only twenty-four hours before the act of signing, and at no time prior to the act of signing, and not until about eleven or fifteen hours after such signing, did Williams' bleeding gums require or receive medical treatment. He was taken to San Angelo on the afternoon of the 18th, because Mrs. Williams got scared on account of the rise of his temperature to 102 and a fraction. Even then they did not start for San Angelo until it got cooler, and after they arrived they did not immediately summon a physician, but about 11 o'clock that night a physician was called to give Williams a hypodermic, according to Mrs. Williams, not because he was bleeding, but because "Mr. Williams was hiccuping so terribly" (Tr., p. 107).

ARGUMENT.

There being a presumption of mental capacity, the burden was on the plaintiff to establish the lack of requisite mental capacity by showing that P. H. Williams, at the time of the execution of the assignment, did not understand the nature and effect of such act.

Williston on Contracts, Vol. 1, Sec. 256, p. 500;
Parker v. Marco, 76 Fed. 510;
Richardson v. Travelers Ins. Co., ... Me. ..., 82 Atl. 1005;
Sbarbero v. Miller (N. J. Ch. Ct.), 65 Atl. 472;
Aldrich v. Bailey (N. Y. Ct. App.), 30 N. E. 264.

As stated by Professor Williston, "the question, therefore, should depend, and, according to the great weight of modern authority, does depend, upon whether the

alleged lunatic had **sufficient reason to enable him to understand the nature and effect of the act in dispute.** It is not necessary, however, that a person should have average mental capacity in order to make a valid bargain. **Mere weakness of mind or a condition approaching imbecility is not sufficient** to constitute what the law regards as insanity."

The rule by which the action of a trial court should be guided in determining whether there was sufficient evidence to go to the jury on an issue, as promulgated by the Supreme Court of the United States, is as follows:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed'" (Gunning v. Cooley, 281 U. S. 90, 94).

The burden cannot be sustained merely by arousing a suspicion as to the issue and by leaving the whole question "in the realm of conjecture, possibility or surmise" (Wallace v. Standard Accident Insurance Co. [C. C. A., 6th Cir.], 63 Fed. [2d] 211).

The evidence in this case fairly shows that Williams had been undergoing a change in his physical and mental condition prior to the date on which he signed the instrument in question. That he was a sick man suffering from a physical malady, which a month later resulted in his death, cannot be denied. As a result of financial reverses and sickness he was despondent. On two occasions he had con-

templated suicide, but reason seems to have prevailed with him each time, as he continued to live, and died a natural death. He showed some evidence of absent-mindedness and forgetfulness also in matters such as the counting of numbers and orders given to hired hands. He kept more to himself than formerly, had less to say to acquaintances and exhibited less interest in them. He had become irritable and cross on occasions.

Certainly the foregoing does not constitute any evidence that Williams did not understand the nature and effect of the signing of the instrument whereby he transferred the dividends due him to Lee & Lee. They are merely circumstances that may be taken into consideration in weighing evidence of a more cogent and direct nature as to a lack of requisite mental capacity at the time of execution.

The fact that Williams had about three degrees of fever on the morning of the 18th of September, and that his gums undoubtedly did bleed some during the twenty-four hours following the extraction of the teeth, and preceding the conversation with George Lee and Humlong and the act of signing, shows beyond peradventure that the deceased was in a weakened condition. But such evidence does not show that he was flighty, mentally exhausted, stupefied, unconscious or otherwise incapable of reasoning on the morning of the 18th. Mahatma Gandhi, as pointed out by the trial judge in his charge, is a striking illustration of a man intensely weak physically and yet intensely strong intellectually. Even when Gandhi fasted in jail for days, he had complete command of his mental powers.

The affirmative facts as to what was said and done on the morning of the 18th belie the fanciful claim that Williams was so weakened physically that he did not have command of his mental faculties. To whatever extent he

had bled, it was not sufficient to require before late that night or the early morning of the next day the summoning of medical aid. As already pointed out, he had medical treatment on the night of the 18th, possibly eleven or twelve hours after the execution of the instrument, but, according to Mrs. Williams, such treatment was a hypodermic administered for the purpose of relieving his pain from hiccuping. The uncontradicted testimony of disinterested witnesses shows that he was not weakened to such an extent that he had to stay in bed on the morning of the 18th. He was up, dressed, and he answered the knock at the door. He was not in bed during the conversation which Mrs. Williams would have us believe lasted for two hours. During such time he was in the living room in a chair, and was moving around to some extent. He voluntarily walked to the front gate to bid good-bye to his visitors whom he came to treat as guests. He was capable, therefore, of reasonable physical exertion during the morning, and at and after the time he signed the instrument. He was also capable of reasoning, as is shown by the details of the conversation he carried on. According to Mrs. Williams and Jeff Jordan, Williams said that he was sick and wanted to put off the business conversation, telling his visitors that he would be in San Angelo within a few days and would then attend to the matter. This, in itself, shows the exercise of mental power. He had been approached on a subject that he might be loath to talk about, even if well. His statement shows his engagement in rational, intelligent and connected conversation. The testimony of Humlong and George Lee brings out that Williams talked to them of his herd of cattle, mentioning where he had gotten them and how proud he was of them. He also talked to them about the oats in his bins, and added that he was holding them for a better price. The carrying on of such

conversation by Williams showed that he had power to reason about business matters, and that he used judgment. Williams had first told George Lee that he was peeved at the insurance company, that he did not want to transfer the dividends to Lee & Lee, that he wanted to keep the dividends himself. This showed not only that he was mentally alert and capable of coherent thought, but that he had understanding of the transaction actually involved. In these respects George Lee and Humlong were wholly uncontradicted.

The fact that Mrs. Williams knew that the two strangers called to discuss business with her husband; that her husband was discussing business with them; that she did not enter the room to inform the strangers that her husband was mentally incompetent and unable to discuss business with them; that she did not enter the room to interfere with her husband or to dissuade him from transacting business with the strangers; that she did not enter the room to lend him any assistance in the transaction of business with the strangers, and that she did not testify that at any time she observed anything unusual in the mental conduct of her husband, is proof positive of the fanciful nature of the claim placed before Court and jury in this case.

The testimony of Dr. Nibling, the plaintiff's own witness and Williams' own physician, shows what Williams' physical and mental conditions were two days before and two days after the act of signing. From the 10th to the 16th Dr. Nibling had given Williams a thorough examination, and on the 16th he made a diagnosis. On all of those days Williams "talked sensibly" in the presence of the doctor. The first medical treatment for bleeding of the gums came quite a few hours after the act of signing, either late on the night of the 18th, or about 3 o'clock in the morning of the

19th. There is further evidence that Williams was confined with bleeding and pain on the 19th, 20th and 21st, and that Dr. Nibling went to see him on the 20th and 21st, and that Williams was still "spitting blood and sitting on the edge of the bed, and had a bucket by the side of the bed where he could expectorate." He found Williams "nervous and more or less unstrung" and "holding ice in his mouth, trying to stop the hemorrhage." Even at the end of forty eight hours and seventy two hours after the signing of the instrument, Williams was not so exhausted from the continued bleeding and the ravages of pain and disease in the interval but that he had retained his mental faculties. According to his own physician, Williams still appeared on the 20th and 21st "to be in his right mind," and such witness for the plaintiff noticed on such dates "nothing the matter with his mind."

It is uncontradicted, then, that Williams was in the possession of his mental powers both two days before and also even two days after the signing of the instrument.

There is no testimony from any one of the plaintiff's witnesses that knew Williams—not even Mrs. Williams or Jeff Jordan, the hired hand—to the effect or even indicating that on the 18th, or for that matter on any other day, that Williams was unconscious from physical exhaustion, in a stupor, out of his head or flighty. There was no testimony from any of such witnesses that on the 18th Williams failed to recognize anyone, or that he could not or did not engage in rational, connected conversation.

The evidence of the witnesses who had known Williams, on the other hand, showed affirmatively that on the morning of the 18th, when the instrument was signed, Williams was up, dressed, walking around, capable of reasonable physical exertion, and that he was clear-headed, recognized

those with whom he came in contact and was able to and did reason and carry on a coherent, intelligent conversation about business and other matters.

Certainly, from so much of the evidence, it could not be reasonably inferred that Williams was incapable of understanding the nature and effect of the simple transaction of transferring the dividends earned on his policies to Lee & Lee to pay a debt that he admittedly owed them. Not even a suspicion of legal mental incompetency at the time is raised.

In re Little's Estate (Dist. Ct. of App., Cal.), 189 Pac. 818;
In re Campbell's Estate (Dist. Ct. of App., Cal.), 189 Pac. 812;
In re Shields' Estate (Sup. Ct. of Iowa), 200 N. W. 219;
In re Richardson's Will (Sup. Ct. of Iowa), 202 N. W. 114;
Richardson v. Travelers Ins. Co. (Me.), 82 Atl. 1005;
Sayre v. Trustees of Princeton University (Sup. Ct. of Mo.), 90 S. W. 787;
In re Latlin's Estate (Sup. Ct. of Neb.), 187 N. W. 885;
Johnson v. Talbot (Mass.), 150 N. E. 900;
Taylor v. Creeley (Mass.), 152 N. E. 3.

In the case of In re Little's Estate the evidence submitted by the contestant may be summed up as follows: The testator, a man of some education, at one time cashier in a bank and later a farmer, succeeded well enough to accumulate a comfortable fortune, but he suddenly met with a series and variety of reverses which so shocked his nervous organization as to have worked changes in his physical and mental characteristics. Death claimed his wife after they had only been married a little over a year.

Shortly thereafter the stable located on his farm was destroyed by fire. This misfortune was soon followed by the theft of an automobile owned by him. Following these troubles he appeared to grow discouraged and disappointed, and applied himself more liberally to the consumption of intoxicating liquors than he had ever before been accustomed to indulge in them. He lost flesh and displayed mental peculiarities not theretofore noticed by anyone. According to some of the witnesses he acted irrationally at times. On one occasion when dwelling on his misfortunes he wrung his hands and talked to himself, and on another occasion while under a great nervous strain he exclaimed that all his misfortunes would drive him crazy. On another occasion he complained that an engine used on the farm was out of order and would not perform, but a machinist found it intact in all respects. Some witnesses for the proponents testified that while the testator on occasions acted very peculiarly and like one laboring under a severe nervous and mental strain, he did not appear to be irrational. There was no positive testimony that the testator was under the influence of intoxicating liquor at the time he wrote his will in longhand. The testator committed suicide about a month after he wrote the will. The trial court took the case from the jury and entered an order admitting the will to probate. On appeal such action was upheld on the ground that the contestants' evidence was not sufficient to make out a case to go to the jury on the issue of lack of testamentary capacity.

In the case of In re Campbell's Estate the evidence, as characterized by the Court, showed "that the deceased had been for many years a heavy drinker of intoxicating liquors, and during the latter years of his life drank liquors to excess; that he was a very old man when he made his will, and that he was feeble physically; that on occasions

he was so ill as to be compelled to take to his bed, the cause of such illness, it is to be inferred from the evidence, being the excessive use of alcoholic liquors; that he could not readily remember old acquaintances when their names were mentioned to him or when they met and greeted him * * *; that he often spoke of the Bible and would ask his friends if they thought he was saved, and would cry very often." The action of the trial court in taking the case from the jury and in awarding judgment against the contestants of the will was upheld on the ground that the evidence was insufficient to require the submission to the jury of the issue of testamentary capacity.

In the case of In re Shields' Estate the testator was a farmer, dying at the age of 71 and leaving surviving him a daughter and a son. The will was executed about two and one-half months prior to his death. There was evidence that the testator had had a spell of sickness and had been confined in a hospital, and that he had arteriosclerosis. Other evidence was to the effect that the testator was at times irritable, childish in some ways and forgetful. A physician called by the contestant testified that the testator talked rationally and sensibly, and that he did not notice anything out of the normal in his mental state when he examined him some time between the execution of the will and the testator's death three months later. The trial court directed a verdict for the proponents of the will and the contestants appealed, but the judgment in favor of the proponents was upheld, the Court saying:

> "Time and again this Court has declared that mere old age or some deterioration in physical or mental powers, or peevishness, childishness and eccentricities are not alone sufficient to carry to the jury the question of mental unsoundness on the part of a testator."

In the case of In re Richardson's Will the testatrix, at the age of 78, executed a will while she was in bed sick with pneumonia, of which she died four days later. The will was executed at about 7 o'clock at night, and on the morning of the same day a physician was called and found her suffering a great deal with pain in her chest, labored respiration and some temperature. He saw her again in the afternoon, found the trouble localized in the right side of the chest and diagnosed it as pneumonia. He found an irregular heart action, which he designated as a partial heart block. He testified that pneumonia caused poisons in the system until they affected mentality, and that heart block impairs the circulation through the brain and the entire system and could affect the mentality to a certain degree. Within a few minutes after the will was executed the same physician saw the testatrix again. He testified that the testatrix would have to be asked a question two or three times, that he did not know whether she was in a state of losing her reason entirely. He added: "I would say, under those circumstances, she was of unsound mind. She was in a certain stupor or mental apathy." Two daughters who saw the testatrix the next morning said that their mother's eyes were glassy, that she was weak and pale and she breathed hard, and that she acted as though she were really too sick to know who they were, or what was going on in the room. The trial court submitted the case to the jury, and the jury returned a verdict for the contestant and found that the testatrix did not possess testamentary capacity. But, on appeal, it was held that the evidence was insufficient to sustain the finding that the testatrix was of unsound mind at the time the will was executed. The Court said:

> "She was physically, not mentally, ill. Any mental disturbance or impairment from which she suffered

was the result of her physical condition. It is not doubted that, as a result of physical ailments, a person may, in the progress of the disease or by reason of weakness, become mentally incompetent, or that this may occur in the case of one suffering from the ills that afflicted the testatrix. **But the evidence wholly fails to show that such a stage had been reached in the course of her illness at the time the will was executed.** She was suffering and was weak; but the only indication of mental disturbance noticed by Dr. Hoefer was that it was necessary at times to repeat questions to her. His statement that she was in a sense of unsound mind clearly had reference to that situation as being a departure from the normal."

The other cases cited are of similar import.

If it be true then that the evidence adduced, exclusive of the testimony of the alienist, Dr. White, was insufficient to carry the case to the jury on any charge as to the issue of lack of mental competency, did the expert opinion of the alienist, who, without ever having seen Williams, gave an answer to a hypothetical question based upon a part of such evidence, and omitting much undisputed material evidence of an adverse nature, require that the case go to the jury on a charge with reference to such issue? The solution of the question depends in part upon the nature of such testimony, which is analyzed by Thayer in the following language:

"They 'judge' the phenomena, the appearances or facts which are presented to them, and testify to that which in truth these signify or really are; they estimate qualities and values. We say that they testify to opinion. In truth, they are **'judging'** something and testify to their conclusion upon a matter of fact * * *; they are simply to aid the final judges of fact,

and not to bind them" (Thayer, "A Preliminary Treatise on Evidence at the Common Law," p. 196).

Time and again, where the alienist has not seen the person whose mental capacity is in issue, and where he answers only a hypothetical question which a court has felt did not, as a matter of law, contain any reasonable basis for the expression of an opinion against mental competency, or which did not contain substantially all of the essential facts proven at the trial by the undisputed evidence, the Court has not hesitated to take the case from the jury notwithstanding such expert opinion.

In Re Little's Estate, Dt. Ct. App. Cal., 189 Pac. 818;
In Re Richardson's Will, Iowa, 202 N. W. 114;
Sayre v. Trustees of Princeton University, Mo., 90 S. W. 787;
Taylor v. Creeley, Mass., 152 N. E. 3.

With reference to the case of In Re Little's Estate we have already shown the essential facts testified to by witnesses who had known and observed the testator. They bear in many respects a striking similarity to the facts relied upon by the plaintiff in this case. In addition, the contestant produced an alienist who was asked a hypothetical question embodying the facts that we have detailed, and he said that in his opinion, at the time the will was written, the testator was insane. Notwithstanding such opinion the Court refused to let the case go to the jury on the issue of mental competency, and such action was upheld on appeal. With reference to the expert testimony the Court said:

"* * * but as to this character of testimony the Supreme Court, in Estate of Dolbeer, 149 Cal. 227, 243, 86 Pac. 695, 702 (9 Ann. Cas. 795), has justly declared: 'The witnesses were skilled alienists, it may be conceded, but the evidence thus adduced of one who has

> never seen the person or who bases his opinion upon the facts given in a hypothetical question is evidence the weakest and most unsatisfactory.'"

In the case of In Re Richardson's Will, likewise a case where the appellate court considered that the evidence was insufficient to go to the jury, notwithstanding the opinions of expert witnesses given in answer to a hypothetical question, the Court characterized the testimony of expert witnesses so given as "a class of testimony generally recognized as weak" and "in this case of little or no value in determining the mental condition of the testatrix at the time the will was executed."

In the case of Sayre v. Trustees of Princeton University, wherein the trial court let the case go to the jury and the jury returned a verdict that the paper writing propounded was not the last will and testament of the testator because of lack of testamentary capacity, and wherein the Appellate Court reversed the case with directions to enter a judgment admitting the will to probate and holding that the evidence was wholly insufficient to go to the jury on any question of mental incompetency, the Court said, with reference to the testimony of several alienists given in answer to a long hypothetical question:

> "We are not bound to accept an opinion based upon facts which the law will not, and does not, recognize as showing a want of capacity to make a will."

In Taylor v. Creeley, the Appellate Court was of the opinion that all of the evidence, notwithstanding the adverse testimony of experts, was insufficient to go to the jury on any issue of mental incompetency.

We have already shown that in our case the cross-examination brought out that the alienist, in giving his answer

to the long hypothetical question propounded to him, went outside the facts stated to him, and from his own imperfect memory of what he had heard in the court room from witnesses, assumed as the principal fact upon which his opinion was based that Williams, prior to the act of signing, had been bleeding "for **two** or **three** days, something like that, and rather extensively." His assumption was unfounded, because of the uncontradicted evidence that, prior to the act of signing, Williams' gums had been bleeding approximately twenty-four hours. It is implied that the alienist's opinion was based upon assumption of such complete physical exhaustion as to make reasonable an inference of mental collapse. Such assumption and such inference are both refuted by facts not put to the witness in the question propounded—facts that at, and for at least an hour or so prior to the act of signing, Williams was up, dressed and responded to the knock at the door when George Lee and Humlong arrived, and that while they were there he engaged in intelligent, coherent conversation about business and other matters, and that when Lee and Humlong left he voluntarily walked with them to the front gate and engaged in more rational conversation—facts which show conclusively that at the time of signing Williams was not only capable of reasonable physical exertion, but also in possession of his mental faculties and power of reasoning.

We submit that there was no evidence from which it may be reasonably inferred that Williams appeared to be **mentally** ill on the morning of September the 18th, much less that he was so mentally ill on such morning that he could not have understood the transaction of assigning the dividends to Lee & Lee.

We submit, therefore, that none of the evidence was suf-

ficient to take the case to the jury on the issue of lack of mental competency. This being so; it follows that the assignment of the dividend declared on the policy that lapsed was valid, that pursuant to such assignment, the dividend was paid to the insured (or his order) in cash, which was one of the options afforded by the policy, and that the dividend was thus validly applied, and cannot be used again for any other purpose. It follows, for such reason alone, if for no other, the trial court erred in not instructing the jury, in accordance with the defendant's request, to return a verdict for the defendant.

In the plaintiff's pleadings there were allegations of fraud, based on the theory that unfair advantage of Williams was taken in the transaction with George Lee and Humlong. No evidence was introduced by the plaintiff on such issue. The evidence heretofore narrated shows conclusively that the accusation was wholly unfounded. The Court did not charge the jury on such issue, and the plaintiff did not request any charge thereon. We take it that such claim has been wholly abandoned by the plaintiff's attorneys.

SECOND SPECIFICATION OF ERROR.

The Court erred in admitting the evidence on behalf of the plaintiff, as follows:

> Question of the plaintiff's attorney propounded to the plaintiff's witness, Dr. F. S. White:
>
> "Now, doctor, please answer the question that I am about to propound to you, basing your answer thereto upon the following assumed state of facts: For several years prior to the year 1931, P. H. Williams was engaged upon a large scale in the oil business, including the drilling of wells. He was active and energetic;

he was, generally speaking, of a sociable disposition, and even temperament. Prior to the year 1931 he suffered heavy financial losses, and became despondent, and on at least one occasion he became so morose as to talk of suicide. In the spring and early summer of 1931 there was noticeable to some of those coming in contact with him some lapse or loss of memory, relating to recent events. During that portion of the year 1931, prior to August 16, 1931, which is the date of the accident that will be hereinafter mentioned, he managed his farm in Irion County, Texas. He at times did work, as driving a tractor, handling cattle and general work about the farm. Prior to August 16, 1931, he gave some signs of occasional indisposition, apparent to his wife, but was able to, and did work, involving physical labor occasionally, as hereinabove indicated. On or about August 16, 1931, while branding a bull yearling, he was kicked in the abdomen by that yearling, with such force as to knock him down. Thereafter, he did not do any work on the farm involving any material or appreciable physical exertion. He did give directions to the farm hands as to the work, but he was not able to bear in his memory from one day to another the directions so given, this being noticeable on a number of occasions. After the said accident he complained of discomfort, and at times pain in the abdomen. When walking he stooped, and at times was observed holding his hands to his abdomen and side. He became short of breath; at any appreciable exertion he would gasp for breath. Hiccups and headaches developed shortly after the accident and continued intermittently until the time of his death. The hiccups continued to a few days before his death, when he suffered a hemorrhage, after which hemorrhage he did not have hiccups. Both shortly prior to the accident and after the accident he was observed, on several occasions, sitting in his car, stooped and bowed over the steering wheel, with his head downcast, being and

remaining in such position for periods of from thirty to forty-five minutes, manifesting on said occasions no interest whatsoever in his surroundings. In the latter part of August and early part of September, 1931, he went through clinical examinations, including laboratory urinalysis and X rays, at the San Angelo Medical and Surgical Clinics. Abnormalities were evidenced, by casts, and some sugar was observed in the urinalysis, but not so as to definitely indicate the cause of his trouble. No positive or definite diagnosis was made by the physicians at the clinic, but the X-rays and other findings suggested to the examining physicians and indicated to them that he had a serious disorder, involving the liver and perhaps the gall bladder—in their opinion either a condition of malignancy or cirrhosis. No condition of ascites or dropsy was noted during the period of said examinations, which extended until about the middle of September, 1931. X-rays made of the teeth during said examination disclosed pus pockets in several teeth, and on September 17, 1931, in the morning of said day, all of his teeth, some fourteen in number, were extracted. A local anaesthetic, with the dental blocking technique, was used. The operating dentist noticed that several teeth had pus pockets at the roots, and further noted a condition of ankylosis, in bone tissue, and a deterioration of bone tissue. In the afternoon of said day of September 17, 1931, the said P. H. Williams went from San Angelo, where the dental operation had been performed, to his ranch or farm in Irion County, Texas, a distance of some twenty miles, being taken there in a car. Upon his arrival there he went to bed, and spent a restless and practically sleepless night, his gums bleeding all during the night, and practically throughout the night, his condition of restlessness being such that his groaning was noticeable to a farm hand sleeping in the next room to the room adjoining the one in which Mr. Williams was sleeping—noticeable at times

during the night. On the morning of September 18, 1931, the said P. H. Williams did not eat any breakfast. He appeared to be to those at the place, and so stated to them, weak and sick. His gums continued to bleed intermittently during the early morning of said date of September 18th. During the preceding night he had had fever. He had some fever during the early morning of September 18th. He had fever in the afternoon of September 18th, a little higher than it had been early in the morning, the fever in the morning being 2 degrees, or thereabouts, above normal, and in the afternoon being something like 2 degrees above that in the morning. He did not eat any dinner. He was in bed most of the early part of the morning of September 18th, and sat up during part of the morning of September 18th, in a chair in the room joining the bedroom. In the afternoon of September 18th he grew weaker. He had been given aspirin while at his house to relieve his suffering and discomfort. In the afternoon or early in the evening or night of September 18th he became—to those surrounding him, to his wife—so weak and his gums bleeding so much that she returned with him to San Angelo, to the Central Hotel, arriving there in the night of September 18th. He remained in the Central Hotel from September 18th to the date of his death. From the night of September 18th until the date of his death—his death occurring on October 15, 1931—he was not, during all of that period, in bed; part of the time he was in bed and part of the time he would sit upon the bed. At times between September 18th and the date of his death—for a few days after September 18th—his gums bled so much he had hemorrhages, and physicians had to be called and morphine administered. On the night of September 18th he was again restless and sleepless. These hiccups were almost constant, with few intermittent periods between September 18, 1931, and the date of the hemorrhage, which preceded his death by

only a few days. He complained during this period, between September 18th and the date of his death, of discomfort and pain in his abdomen, shortness of breath, being troubled so much that he had to be propped up and had to sit up in bed with a pillow behind him instead of lying down. Now, he was able to go to see a doctor on or about September 30, 1931, able to walk to his office, to the doctor's office, that doctor being Dr. Marberry. Dr. Marberry found, upon examination, when P. H. Williams first came to him in the latter part of September or at the last of September, a marked condition of ascites or dropsy, and found by manipulation and examination that the liver was abnormally small. His diagnosis was cirrhosis of the liver. The prognosis was very unfavorable, he stating that he saw nothing could be done to save him. The only thing that he undertook to do was to try to alleviate, to some extent, the discomfort produced by this dropsy—alleviating that by injecting a needle in the abdomen and drawing off the fluid on several occasions, the amount of fluid running as high as two gallons. Dr. Marberry treated him once, perhaps twice, at the office. He went to see Mr. Williams at the hotel also, and performed this operation to alleviate his discomfort from the ascites. He said that no appreciable relief was obtained. Those who observed P. H. Williams noticed changes in him, physically and otherwise, and some noticed them at one time and some at another time, some placing the date early in the year 1931, some in the summer of 1931, some before, and some after, the date of the accident in August, 1931. Dr. Nibling, one of the physicians in the clinic, noted that Williams was suffering from a serious disorder—such a disorder as to result in a toxic condition calculated and likely to influence or affect his nervous system and his mental powers, but Dr. Nibling stated that he did not observe unsoundness of mind. Those who were in contact with P. H. Williams and closely asso-

cinted with him observed marked change, both as to his physical condition and as to his mental condition, as hereinabove outlined, and as to his personality, and as to his characteristics, and these changes had been observed and noted prior to September 18, 1931.

Now, doctor, basing your answer upon said assumed state of facts, please state whether or not in your opinion P. H. Williams, on September 18, 1931, had the mental power and capacity to weigh and understand and consider the nature and effect of a business transaction, assuming that all of those facts are true.

Answer: I will answer that question, assuming all of these statements are true, and assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper."

for that the sum total of the evidence introduced on the basis of which the hypothesis was stated was insufficient to form any basis for the framing of a hypothetical question to an alienist as to the mental capacity of P. H. Williams; for that the question, taken as a whole, was too vague and indefinite in detail to form any basis for the rendering of an opinion by an alienist; for that, taken as a whole, there was no basis in the testimony for the assumption of facts stated to the witness; for that the assumption in such question that Williams had suffered a loss or lapse of memory as to recent events was objectionable on the ground that there was no specification of the things not remembered or of the surrounding circumstances or of the dates of such matters; for that the assumptions in such question, as to some signs of occasional indisposition apparent to the wife as to material or appreciable physical exertion, followed at some vague and indefinite time by a lack of material or appreciable physical exertion on the part of said Williams; as to Williams not being able to bear in his memory, from

one day to another, directions given by him to people on his farm; as to Williams, at times, holding his hands to his side; as to Williams, on several occasions, being observed sitting in his car, drooped and downcast; as to Williams, after going to San Angelo to consult doctors, being part of the time in bed and part of the time not; as to Williams suffering a shortening of breath so much that at times he had to sit up and be propped up, were too vague and indefinite to form any basis for the expression of opinion by an alienist as to Williams' mental capacity; for that there was no basis in the testimony for the assumption of facts stated in the question with reference to Williams not being able to bear in his memory from one day to another directions that he had given; for that the assumption in such question with reference to certain witnesses having noticed a change in Williams' condition or a marked change in condition, mentally and physically, did not inform the alienist as to what the changes were; and for that, in other respects too numerous to mention, the question was too vague and indefinite; and for that, in other respects too numerous to mention, there was no basis in the testimony for the facts assumed.

STATEMENT AND ARGUMENT.

The foregoing specification contains a full statement of the facts assumed in the hypothetical question propounded to the alienist and a full statement of the objections made by counsel to the question propounded, and such statement of facts and objections will not be repeated here. The statement contained under the third proposition relating to the first specification of error is applicable and will not be repeated. No additional statement is needed.

The principal objection made to the question propounded

was that there was no basis in the testimony for the assumption of the facts stated to the witness.

There were several more or less minor discrepancies between the facts stated by the plaintiff's attorney and the record on which they were supposed to be based. For example, the question states that Williams was "not able to bear in his memory from one day to another the directions so given." The reference is to directions given to farm hands after the injury from the bull in the middle of August, 1931. Only two farm hands testified, to wit, Jeff Jordan and Jim Mabry. Each testified to some forgetfulness on Williams' part after such injury, but neither one characterized it as a daily occurrence. Another overstatement of the case contained in the question is with reference to the occasions when Williams sat in his car, stooped and bowed over the steering wheel. It was stated that he would remain in such position "for periods of from thirty to forty-five minutes" and that he did so "on several occasions." Only one witness, to wit, A. E. Henderson, testified to one, and only one, occasion when Williams remained in such position for more than one-half hour, and the only other witness to testify to any such incident, to wit, Jim Mabry, stated that they lasted from ten to thirty minutes (Tr., pp. 128, 123). Again the question erroneously states, "on the morning of September 18, 1931, the said P. H. Williams did not eat any breakfast. He appeared to be to those at the place, and *so stated to them, weak and sick.* His gums continued to bleed intermittently during the early morning of said date of September 18." Mrs. Williams was the only witness to testify as to what took place during the early morning, and her only testimony as to what happened then is as follows:

"I took his temperature the next morning, between

7 and 8, and it was still about what it had been, between 100 and 102.

Mr. Williams wouldn't eat anything the next morning; he didn't even sit at the table. He did not get up when I got up to fix breakfast for Mr. Jordan. Later he slipped on his clothes and went out to the toilet in the back yard, as we had no conveniences in the house. He did not tie his shoes; he just slipped on his shirt and trousers and shoes. He took some more aspirin; he was just living on aspirins. He left his clothes on" (Tr., p. 105).

So the statement of the question to the effect that Williams, in the early morning of the 18th, was, and he so stated to them, weak, is not borne out by the testimony. Another exaggeration is contained in the question in the following statement:

"In the afternoon of said date of September 17, 1931, the said P. H. Williams went from San Angelo * * * to his ranch or farm in Irion County, Texas, a distance of some twenty miles, **being taken** there in a car" (Tr., p. 206).

There is no evidence that Williams did not drive himself out to the ranch. The only testimony in the record is from Mrs. Williams, and is as follows:

"About sundown we decided to go out to the farm. He thought he might rest better out there. We got there about dark, on the night of September 17" (Tr., p. 105).

A few other minor exaggerations or unsupported statements could be mentioned. Perhaps such exaggerated statements or misstatements would not be sufficient in and of themselves to require a reversal on account of the Court's admission of the doctor's answer, over the objection of the defendant's attorney, if it were not for the

further fact that such question contains a misstatement which we believe should be regarded as material and highly prejudicial, and, therefore, so important an error as to require a reversal.

The misstatement now referred to is as follows:

> "In the afternoon or early in the evening or night of September 18th he became—to those surrounding him, to his wife—*so weak and his gums bleeding so much* that she returned with him to San Angelo, to the Central Hotel, arriving there on the night of September 18th" (Tr., p. 207).

Mrs. Williams was the only one to testify as to what happened on the afternoon of the 18th, and her whole testimony on said subject is as follows:

> "I helped him to the bed in his room, where he sat down on the bed and took some aspirins, and I slipped his shoes off and straightened him out on the bed. I put a wet towel on his forehead. I took his temperature, and it was between 102 and 103, and that scared me, and I telephoned to my son in San Angelo to bring some ice out and to take us back to the doctor. My son come. We waited until it got cooler, and then we took Mr. Williams back to town, after sundown" (Tr., p. 107).

It is seen from such quotation that Mrs. Williams decided to go back to town and summoned her son for such purpose solely because she was scared after taking Williams' temperature and finding that it was between 102 and 103. She made no reference to his condition of weakness or to his bleeding gums as being any cause for the decision to return to San Angelo.

Inasmuch as this unsupported statement related to Williams' physical condition only a very few hours after

the signing of the instrument transferring the dividends, and inasmuch as the doctor testified on cross-examination that his opinion was based so largely upon the weakened physical condition that he assumed to exist on the 18th of September, the unsupported statement should be deemed a material error, and should have required the exclusion of the answer to the question so framed. The admission of the answer over the defendant's objection, we submit, now requires a reversal.

Another principal objection made to the question propounded to Dr. White was that the sum total of the evidence introduced, forming the basis for the framing of the hypothetical question, was insufficient for such purpose, no case being made out by such evidence from which it might be reasonably inferred that at the time the instrument was signed by Williams he was incapable of understanding the nature and effect of the transaction. That such evidence did not form any reasonable basis for such inference has already been pointed out in argument under the third proposition under the first assignment of error.

Other objections contained in the foregoing specification of error are well founded and lend accumulated weight to our contention that the admission of the answer of Dr. White to the hypothetical question, over the objections made in behalf of the defendant, constitutes an error requiring reversal.

THIRD SPECIFICATION OF ERROR.

The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation quoted totidem verbis from his charge to the jury:

"The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * *If she has done that, then she is entitled to a verdict.*

* * * * * * *

"There is also an option one, and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'

* * * * * * *

"The Court holds that, under those two options that I have read, that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now, think with me carefully—was that done in this case? *Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff.* If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was, in truth and in fact, an instrument given for the transfer of that particular dividend to Lee & Lee on the note which Mr. Williams owed Lee & Lee for the premium that was paid by them on the year before. But no one may make such a contract as that, or any contract, for that matter, unless he is in his right mind. If he was not in his right mind at that time, or, if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee & Lee, and you will determine that particular

question; and then you will determine the further question as to whether or not, under all of the circumstances of this case, he ordered, and was entitled to have that dividend purchase extended insurance.

* * * * * * *

"If you find that Mr. Williams, at the date of executing this order to Lee & Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee & Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff,"

for that such charge expressly or impliedly indicates, but erroneously indicates, that the insured had the right, under the policy, to the use of the 1931 dividend for the purchase of extended insurance, and for that the same is contrary to the evidence and to the valid provisions of the policy which established that if the policy should lapse for the nonpayment of the premium, as it did lapse for the nonpayment of the January 10, 1931, premium, that the dividend then due should be paid in cash.

STATEMENT AND ARGUMENT.

The foregoing specification shows, in substance, the entire charge of the Court relative to what the jury would have to believe in order to return a verdict for the plaintiff. The statement under the first proposition under the first specification of error is applicable. Such statement sets forth the terms of the policy, which are also quoted in full in the transcript at pages 83 to 90.

The trial court, in substance, charged the jury that the 1931 dividend had become a dividend left with the company for the purpose of accumulating interest, but was

usable for the purchase of extended insurance. The Court further charged the jury, in substance, that if they found that there had not been a valid payment of the dividend to the insured in cash, and if the dividend was still due, then they should find that it had been used to purchase extended insurance, and they should return a verdict for the plaintiff.

The Court evidently read article 11 of the policy providing for several options as to the disposition of a dividend declared on a policy, and among such options found the option that "dividends may be * * * left to accumulate, with interest at 3 per cent, increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy, subject to withdrawal at any time."

Then the Court evidently read article 17 and found that the surrender value of the policy (less deductions on account of indebtedness on the policy) may be "applied to the extension of this policy as participating term insurance from the date to which premiums had been paid without any further payment (Table 1). Accumulations of dividends at interest may be applied to increase the term of extension." The option provided for in article 17, with reference to the purchase of extended insurance, is, by the terms of article 16, made the automatic disposition of the policy value "if on failure to pay a premium no option is exercised."

The Court concluded that under such options the 1931 dividend had been left with the insurance company to accumulate at interest, and that, therefore, there were "accumulations of dividends at interest" available to increase the term of extension automatically purchasable with the policy value. The policy value, after deduction

of the policy indebtedness, was only $11.12, and such value automatically applied, upon lapse of the policy, was not sufficient to keep the insurance in force through the days of grace as extended term insurance commencing June 10, 1931, the date to which the premiums had been paid. But the amount of the 1931 dividend was $74.80, and such sum, if added to $11.12, was sufficient to keep the extended term insurance in force beyond the date of the death of the insured.

The Court reasoned that if the 1931 dividend, which he thought had been left to accumulate at interest, had not been subsequently and validly paid in cash to the insured, or his order, then the dividend was still an accumulation, and that it had been automatically applied either as a part of or as an addition to the policy value available for the purchase of extended insurance.

The Court, therefore, charged the jury: "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * If she has done that then she is entitled to a verdict." And again: "If you find that he [Williams] did make such an order [for the transfer of the 1931 dividend to Lee and Lee], and that he did not know what he was doing, then you should find for the plaintiff."

The trouble with the Court's reasoning is that it is based on the false premise that there were "accumulations of dividends at interest," and that the 1931 dividend had become such "accumulations" available as "accumulations" for the purchase of extended insurance. We have heretofore pointed out that the 1931 dividend became usable

on June 10, 1931, and that any term of extension began on June 10, 1931. There was no interval, therefore, during which the 1931 dividend could have been allowed to earn any interest. We have pointed out that under the terms of the policy a dividend can be left to accumulate with interest "until the maturity of the policy," only when left while the policy is to be continued and is continued in force. We have pointed out that the option to leave a dividend to accumulate with interest is, under the terms of the policy, one of several options that, with respect to any given dividend, may be exercised only during the days of grace and not subsequently; that there was no such exercise of any such option by the insured within the days of grace and that upon the expiration of the days of grace and the lapse of the policy, the dividend automatically became usable only in cash and not otherwise. Our argument in support of such points has been made under the first proposition under the first assignment, and will not be repeated here.

On account of the error in the Court's charge with reference to the availability of the 1931 dividend as an accumulation of dividends at interest available for the purchase of extended insurance, we submit that the judgment of the trial court should be reversed.

FOURTH SPECIFICATION OF ERROR.

The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation, quoted totidem verbis from his charge to the jury:

> "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the

amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * If she has done that then she is entitled to a verdict.

"There is also an option one and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'

"The Court holds that under those two options that I have read that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now, think with me carefully—was that done in this case? *Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff.* If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee and Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them on the year before. But, no one may make such a contract as that, or any contract for that matter, unless he is in his right mind. *If he was not in his right mind at that time, or, if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee, and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case, he ordered, and was entitled to have, that dividend purchase extended insurance.*

* * * * * * *

"If you find that Mr. Williams, at the date of exe-

> cuting this order to Lee and Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee and Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff,"

for that such portion of the charge expressly or impliedly indicates, but erroneously indicates, that the insured did exercise any right in any way to use dividends for the purchase of extended insurance, and for that there was no evidence of any such exercise or application within the time specified in the policy therefor, or in fact at all.

STATEMENT AND ARGUMENT.

The statement made under the first proposition under the first specification of error is applicable. The only evidence in the entire record as to any expression by the policyholder variant from the assignment of the dividend to Lee & Lee is contained in a letter from Lee & Lee to the defendant. Such letter was not written until September 14, 1932. It recites that "about the 1st of September" the defendant's agent at San Angelo saw Williams and "Williams told him he was not going to sign the surrender vouchers with any part of it made payable to Lee & Lee, that it was a crooked deal and that *he was going to have every nickel applied towards paying these policies as far as it would carry them*" (Tr., p. 97).

Such hearsay expression did not occur until about September 1st. There is no evidence of any attempt whatever to select or exercise any option, and no evidence of any expression by the policyholder, within the thirty-one days of grace.

Our argument that, under the policy provisions, such options, if exercisable at all, had to be exercised within the days of grace, and that at the expiration of the days of grace, upon lapse of the policy, the dividend due June 10, 1931, automatically became payable in cash, and was not otherwise usable, is set forth under the first proposition under the first specification of error. It is unnecessary to repeat such argument here.

FIFTH SPECIFICATION OF ERROR.

The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation, quoted totidem verbis from his charge to the jury:

> "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it, as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * *If she has done that, then she is entitled to a verdict.*
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> * * * * * * *
>
> "There is also an option one and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'
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> * * * * * * *
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> "The Court holds that under those two options that I have read, that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now, think with me carefully—was that done in this case? Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff. If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was, in truth and in fact, an instrument given for the transfer of that particular dividend to Lee & Lee on the note which Mr. Williams owed Lee & Lee for the premium that was paid by them on the year before. But no one may make such a contract as that, or any contract for that matter, unless he is in his right mind. *If he was not in his right mind at that time, or if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee & Lee,* and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case he ordered, and was entitled to have that dividend purchase extended insurance.

* * * * * * *

"If you find that Mr. Williams, at the date of executing this order to Lee & Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee & Lee, and that he knew what he was doing, then you should find for the defendant. *If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff.*"

for that the portion of the charge quoted submits to the jury an issue of the insured's mental incompetency and to find for the plaintiff if it found the insured mentally incompetent, and for that the evidence was insufficient to justify the submission of such issue to the jury.

STATEMENT AND ARGUMENT.

The statement and argument made under the second proposition under the first assignment of error is applicable. We submit that it sustains the point that the evidence was insufficient to justify the submission to the jury of any issue as to the insured's lack of mental competency at the time he transferred the dividends to Lee & Lee. We submit that the Court erred in charging the jury upon such issue and in permitting the jury to return a verdict for the plaintiff if they found that the insured did not know what he was doing when he signed the order transferring the dividends.

SIXTH AND SEVENTH SPECIFICATIONS OF ERROR.

Sixth. The Court erred in giving to the jury the instruction indicated by the underscoring (here shown in italics) in the following quotation totidem verbis from his charge.

> "'Write your verdict, please, upon a form which the clerk will give you, saying: 'We, the jury, find for the plaintiff in the sum of $9,101.12, plus $910.00 *attorneys' fees, plus 12 per cent penalty,* plus 6 per cent interest from January 1, 1932.'"

for that the state statute with reference to attorneys' fees and penalties is unconstitutional, and for that the provisions of such statute with reference to the recovery of attorneys' fees or penalties were not complied with in this case.

Seventh. The Court erred in overruling the special exception filed by the defendant in his answer to the petition filed in this case with reference to the recovery of attorneys' fees and penalties.

FIRST PROPOSITION.

Article 4736 of the Revised Statutes of Texas, 1925, neither in its original form nor as amended by the Acts of 1931, Forty-second Legislature, page 135, Chapter 91, Section 1, is constitutional, for that such statute denies the defendant the equal protection of the laws and deprives the defendant of its property without due process of law, in violation of Amendment 14, Section 1 of the Constitution of the United States.

STATEMENT.

The seventh specification of error raises the question of the constitutionality of the statute with reference to penalties and attorneys' fees by a special exception, contained in the defendant's first amended original answer (Tr., p. 35) to the plaintiff's claim in her first amended original petition for the recovery of statutory penalties and attorneys' fees (Tr., pp. 17-34).

The sixth specification of error raises the same question as to the constitutionality of the statute by embodying the objections made to the Court's charge, which permitted the jury to return a verdict for the plaintiff and to assess damages, including statutory penalties and attorneys' fees. Therefore, the two specifications of error may be conveniently grouped for purposes of argument as to the constitutionality of the statute.

The Court overruled the special demurrer, and the defendant duly excepted (Tr., p. 73). The Court charged the jury, if it found for the plaintiff, to add to its verdict an assessment of $910.00 attorneys' fees (the amount agreed upon as reasonable if recoverable), and 12 per cent of the primary recovery as a penalty (Tr., pp. 187, 188, 192). To such verdict the defendant duly excepted.

for the reasons stated in the sixth specification of error (Tr., p. 188). The judgment against the defendant includes $910.00 as attorneys' fees and the 12 per cent penalty (Tr., pp. 73, 74).

The plaintiff alleged, and at the trial it was agreed, that the defendant, prior to the application for the policy and prior to the issuance thereof, had secured a permit to do business in the State of Texas and a license to do business in such state, upon its application made therefor, as a life insurance (legal reserve) company operating under the statutes of the State of Texas, pertaining to such kind and character of insurance companies, and at all times thereafter so operated under said permit and license, and that it was at all times a private corporation, incorporated under the laws of the State of Ohio (Tr., p. 82).

ARGUMENT.

The state statute, as amended, reads:

> "*In all cases where a loss occurs and the life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent damages on the amount of such loss, together with reasonable attorney fees for the prosecution and collection of such loss.* Such attorney fee shall be taxed as a part of the costs in the case. The Court in fixing such fees shall take into consideration all benefits to the insured incident to the prosecution of the suit, accrued and to accrue on account of such policy."

The italicized portion shows the statutory provision as

it existed in the Revised Statutes of 1925. The portion not italicized was added by the Amendment of 1931, and is wholly immaterial to the discussion of the constitutionality of the statute.

The defendant has defended the suit brought on the ground that under the valid provisions of the policy there was no extended insurance in force at the date of the death of the insured, P. H. Williams. No Court can say that this defense is vexatious or that it is not made in good faith.

The defendant has defended the suit also on the ground that the dividend, having been paid to the insured or his order, was under no circumstances available for the purchase of extended insurance. The plaintiff sought to avoid the effect of such a payment by pleading that the insured was non compos mentis at the time that he consented to the payment of the dividend in question.

The first intimation the defendant had that there was any claim that the dividend had not been validly paid in cash, or that there was any claim that the insured was non compos mentis, came from the defendant's attorneys in a letter dated March 17, 1932, which was some time after the suit was filed (Tr., p. 160). The suit was filed February 29, 1932 (Tr., p. 8). The evidence shows that the thinnest sort of evidence possible was adduced by the plaintiff at the trial on the issue of the insured's mental incompetency; and the insured's own physician, a witness for the plaintiff, admitted on cross-examination that both two days before and two days after the act of the insured whereby the insured transferred the dividend to Lee & Lee and caused the defendant to pay the same in cash to Lee & Lee, he could find nothing the matter with the insured's mind, and that the insured always talked

sensibly in his presence. Certainly under such circumstances it cannot be said that the defendant was unreasonable in permitting the case to go to suit. If the plaintiff had to resort to an imported alienist who never saw the insured to find the sole person to testify that in his opinion the insured was mentally incompetent on the morning on which the insured signed the order transferring the dividend, can it be said that there was any vexatious delay on the part of the defendant because it did not admit liability in advance of a judicial finding as to the insured's state of mind on the date of the transfer?

Our state courts have construed our Texas statute, however, as imposing against life, health and accident insurance companies the burden of incurring an absolute liability for attorneys' fees and penalties (in case there is a loss under the policy and payment is not made pursuant to demand), regardless of whether or not any such company has reasonable grounds for believing that it is not liable, regardless of whether or not the issue as to its liability is one upon which there may be an honest difference of opinion, and regardless of whether or not there is any vexatious delay involved in the company's refusal to recognize its liability.

National Life Assn. v. Parsons, T. C. A., 170 S. W. 1038;
New York Life Ins. Co. v. Veith, T. C. A., 192 S. W. 605.

It cannot be doubted that the equal protection of the laws guaranteed by the Constitution includes "the equal right to resort to the appropriate courts for redress."

Missouri v. Lewis, 101 U. S. 22;
Power Mfg. Co. v. Saunders, 274 U. S. 490.

Any state may classify the persons within its jurisdiction, and impose a different burden upon the individuals of each class. But such classification must not be based upon arbitrary or irrelevant distinctions. It "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."

> G. C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150;
> Magoun v. Illinois Tr. & Sav. Bk., 170 U. S. 283;
> A. T. & S. F. R. Co. v. Matthews, 174 U. S. 96;
> W. W. Cargill Co. v. Minnesota, 180 U. S. 452.

The "loss" which such an insurance company must pay is nothing but a debt.

It cannot be denied that the business of insurance is one clothed with a public interest. It is subject to public regulation. Doubtless it may be subjected to special rules as to those aspects wherein it touches the policy of the state in some way peculiar to itself. The state may always prohibit the making of contracts injurious to the plaintiff's interests. So, valued policy laws may be justified as tending to prevent reckless fire insurance with its attendant evils; and standard policy laws, because they make insurance contracts more nearly uniform and certain, and prevent the insertion in them of provisions dangerous to the common weal. Laws directing that copies of the applications be attached to the policies, laws providing that immaterial breaches of warranty shall not annul the insurance, laws requiring that notice be given of accruing premiums—all these deal with features of insurance business that are peculiar to it, and relative to which it may well be specially classed and specially regulated. But in the obligation to perform their contracts and pay their debts insurance companies do not differ

from other natural or artificial persons, and therefore in this regard they ought not to be classed by themselves. When a lawful contract has been made the public has no interest in it other than that it shall be fulfilled by both parties; and the courts should be equally open to them both for the double purpose of ascertaining their respective liabilities and enforcing the discharge thereof.

It is the duty of every person to pay his rightful debts; but it is not the duty of anyone to pay an unjust claim made upon him. Few courts would tolerate an attempt to make a policy of life insurance absolutely incontestable from its date. Fraud and self-destruction would be wholly nullified by such encouragement. Yet this partial and unequal statute goes very far towards driving all life, health and accident insurance companies away from the courts, and making their policies virtually incontestable. For no matter how convinced a company may be that a claim made upon it is wrongful, it dares not refuse payment unless it has in hand evidence sufficient to force a verdict from the jurymen whom the law tells that it is an unworthy suitor.

Certainly, in the matter of detecting, several months after the death of an insured, the state of the insured's mind with reference to a transaction to which an insurance company was not a party, an insurance company is on no different plane from that of any other natural or artificial person. An insurance company is no better equipped for the detection of the state of mind of policyholders than other natural or artificial persons. A life insurance company is not an alienist.

Certainly, an insurance company that relies on the presumption that a policyholder was in his right mind when he entered into a transaction with a third person is just

as reasonable as any other natural or artificial person in doing so. Certainly, in denying liability when it is not informed by the claimant that there is any contention that the policyholder was not in his right mind at the time of the transaction with the third person, an insurance company is just as reasonable as any other person, natural or artificial.

Under the circumstances of this case, to deny the defendant resort to the courts and to hold it absolutely liable for penalties and attorneys' fees, even though its liability to the plaintiff, if it should be found to exist, was one about which there might be an honest difference of opinion, and even though there has been no vexatious refusal on the part of the defendant to pay the plaintiff, is to take the defendant's property without due process of law and to deny to it the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution.

The Eighth Circuit Court of Appeals, in the recent cases of Standard Accident Ins. Co. v. Rossi, 35 Fed. (2) 667, and Inter-Southern Life Ins. Co. v. McElroy, 38 Fed. (2) 557, held that a similar Arkansas statute, if construed in the way that our Texas statute has been construed—as imposing an absolute liability on the part of the insurance company for penalties and attorneys' fees, even though "the refusal to pay without suit is based on an honest and fairly debatable difference of opinion as to the law involved," and even though there was no "vexatious and inescapable neglect and failure to respond to contract obligations"—would be unconstitutional, in that it would be violative of the due process of law and equal protection of the law clauses of the Constitution of the United States.

We are not unmindful that in 1901, and again in 1902, the constitutionality of the Texas statute was upheld by the United States Supreme Court.

> Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 308; Iowa Life Ins. Co. v. Lewis, 187 U. S. 335.

In the Mettler case the constitutionality of the statute was attacked solely on the ground that the statute applied only to life and health insurance companies and did not apply to fire, marine and inland insurance companies and mutual benefit and relief companies doing business within the State of Texas. The Court held that the separate classification of life and health insurance companies was not arbitrary and unreasonable. It considered the question of constitutionality from no other angle.

The Lewis case merely followed the Mettler case, without discussing the question of constitutionality.

In the Mettler case Mr. Justice Harlan, with whom Mr. Justice Brown concurred, wrote a very strong dissenting opinion, in which he stated that, even though "a state may impose conditions upon its own and foreign corporations," he could not subscribe to the doctrine that "a provision of a state enactment relating to corporations, foreign or domestic, was legally operative and binding if such provision be inconsistent with the Constitution of the United States."

Since 1902 the views of the United States Supreme Court have undergone quite a development, particularly with reference to the meaning and applicability to foreign corporations of the Fourteenth Amendment. In Hanover Fire Ins. Co. v. Harding, 1926, 272 U. S. 494, Mr. Chief Justice Taft gives a very informative history of several decisions since 1906 which have brought about such de-

velopment and change of views. It can no longer be doubted that a state has no authority to impose "unconstitutional conditions" upon a foreign corporation that it licenses to do business within its borders.

We submit that it is time that the constitutionality of the Texas statute be examined anew, particularly as now construed by our Texas courts, and as applied to the specific circumstances of this case.

SECOND PROPOSITION.

Assuming such statute to be a valid law, still the defendant is not liable for the penalties and attorneys' fees thereby imposed, because no demand was made upon it for the payment of the loss before the suit was begun.

STATEMENT.

In her first amended original petition the plaintiff pleaded, with reference to a demand upon the defendant for the payment of the loss under the policy, that on or about November 4, 1931, through her attorney, she formally notified the defendant of the death of P. H. Williams and requested the defendant to send her proper forms for making proof of death under said policy; that on or about November 12, 1931, the defendant notified the plaintiff, through a communication to her said attorney, that it did not recognize any liability under such policy and that proof of death would not be required. The only further pleading with reference to a demand made upon the defendant was as follows:

> "That said communication dated November 4, 1931, from her said attorney to said defendant was not only a request for death forms as aforesaid, but was also, and was so intended by her and so construed by de-

fendant, as a demand for the payment to her of all amounts lawfully accrued to her as beneficiary aforesaid, that is, the face amount of said policy, to wit, the sum of ten thousand dollars ($10,000.00), less all lawful and valid indebtedness and advances thereon" (Tr., pp. 19, 20).

The letter from the plaintiff's attorney, referred to in the pleading, contained only advice of the death of P. H. Williams and a request that the defendant send proof-of-death forms for execution and return to it (Tr., p. 99). The reply letter from the company did contain a denial of liability (Tr., p. 100).

After such denial of liability, there was no further demand made upon the defendant, nor was any further demand claimed in the pleadings of the plaintiff.

ARGUMENT.

In a case where a loss occurs, the statute set out under the first proposition requires the imposition of a penalty where the insurance company "shall fail to pay the same within thirty days after demand therefor."

It has been held by the Supreme Court of Texas, however, that the mere furnishing of proof of death, followed by denial of liability by the insurance company, unaccompanied by further demand upon the insurance company, is insufficient to make the insurance company liable for penalties or attorneys' fees (Mutual Life Ins. Co. v. Ford, 103 Tex. 522, 131 S. W. 406).

CONCLUSION.

For the reasons hereinbefore given, the appellant, The Union Central Life Insurance Company, prays that the judgment of the trial court be reversed, and that the cause be remanded with such directions as shall be proper.

Respectfully submitted,

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